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United States
1113
Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of W. N. RUSSELL, Bankrupt.

THE SCANDINAVIAN AMERICAN BANK
OF BIG TIMBER, MONTANA, a Corpora-
tion,

Petitioner,

vs.

JOHN G. ELLINGSON, Trustee for the Bankrupt,
W. N. RUSSELL, Doing Business Under the
Name of W. N. RUSSELL LUMBER COM-
PANY, and W. N. RUSSELL, as an In-
dividual,

Respondent.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved
July 1, 1898, to Revise, in Matter of Law, a Certain Order
of the United States District Court for the
District of Montana.

Filed

SEP 24 1917

F. D. Monckton,

Clerk.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*United States Circuit Court of Appeals for the
Ninth Circuit.*

**THE SCANDINAVIAN AMERICAN BANK OF
BIG TIMBER, a Corporation,**

Petitioner,

vs.

**JOHN G. ELLINGSON, Trustee for the Bankrupt,
W. N. RUSSELL, Doing Business Under the
Name of W. N. RUSSELL LUMBER COM-
PANY, and W. N. RUSSELL as an Indi-
vidual,**

Respondent.

In the Matter of W. N. Russell, Bankrupt.

**Petition to U. S. Circuit Court of Appeals for
Revision and Review, etc.**

Petition for Revision and Review in Section 24b of the Bankruptcy Act of 1898 of the Proceedings of the United States District Court for the District of Montana.

Petition for Revision in the United States Circuit Court of Appeals for the Ninth Circuit, In the Matter of W. N. Russell, Bankrupt.

Petition of Scandinavian American Bank of Big Timber, Montana, a corporation to the Circuit Court of Appeals to review an order in bankruptcy declaring void and fraudulent a certain mortgage made by the bankrupt to your petitioner.

The petitioner the Scandinavian American Bank of Big Timber, Montana, a corporation duly organized and existing under and by virtue of the laws

of the State of Montana, respectfully avers, that it is a creditor of Russell Bankrupt in the amount aggregating four thousand six hundred twenty and 90/100 (\$4620.90) Dollars, that a certain petition in bankruptcy was filed in the District Court of the United States for the District of Montana praying that the said W. N. Russell would be adjudicated a bankrupt, and that thereafter on the 15th day of March, 1916, the said W. N. Russell was in the said District Court duly adjudicated a bankrupt, and the matter of his said bankruptcy was by the Honorable George M. Bourquin, Judge of the District Court, duly referred to the Honorable E. M. Niles, one of the Referees in Bankruptcy of the said District Court, that thereafter the said E. M. Niles as such referee, duly set, fixed and appointed the 3d day of April, 1916, ten A. M., as the time for the first creditors meeting in the matter of the said [1*] bankruptcy of the said W. N. Russell to be held at the office of the said Referee at Livingston, Montana, at which said time and place creditors of the said Russell were to appear, offer for filing their proofs of claims, elect a trustee of the estate of the said bankrupt, W. N. Russell and transact such other business as would properly come before the said meeting. That the said Referee gave due and legal notice to all creditors and the parties interested in the said matter and estate of the said W. N. Russell at the said creditors' meeting.

That on the 3d day of April, 1916, at ten o'clock

*Page-number appearing at foot of page of original certified Petition for Revision.

A. M. creditors of said bankrupt holding a majority of the claims against said bankrupt appeared at the place designated where the first meeting of creditors was to be holden, duly and legally filed their proofs of claims, and at said meeting the above named John G. Ellingson was elected trustee for the benefit of the creditors of said bankrupt; that thereafter, to wit: on the 15th day of May, 1916, your petitioner offered for filing proof of its preferred claim in the form of a chattel mortgage on certain personal property, copy of which proof is hereto attached marked Exhibit "A"; that thereafter objections were filed on the part of the creditors, a copy of which objections is hereto attached marked Exhibit "B"; that thereafter a hearing was had upon the objections and the Referee made the Order, a copy of which is hereto attached marked Exhibit "C".

Your petitioner further alleges: that thereafter and on or about the 29th day of December, 1916, your petitioner filed a petition to review the order of the Referee, a copy of which petition is hereto attached marked Exhibit "D".

Your petitioner further alleges, that on the 12th day of April, 1917, the Honorable George M. Bourquin, Judge of the District Court of the United States in and for the District of Montana, made an Order, a copy of which is hereto attached marked Exhibit "E".

Your petitioner further alleges that the said order is contrary to law and is contrary to the evidence herein in that the evidence shows that the said mort-

gage was made by the parties in good faith, and to secure the amount named therein and that the terms of the said mortgage were substantially complied with and that the evidence is insufficient to justify [2] said order in holding the said mortgage void and fraudulent.

WHEREFORE your petitioner feeling aggrieved because of said order, prays that the same may be reviewed as provided in the Bankruptcy law of 1898.

Dated this 25th day of June, 1917.

CAMPBELL & DORIS,

MILLER, O'CONNOR & MILLER,

Attorneys for Petitioner.

State of Montana,

County of Lewis and Clark,—ss.

James F. O'Connor, being first duly sworn on oath, deposes and says; that he is one of the attorneys for the above-named petitioner; that he makes this verification for and in behalf of the petitioner as such attorney; that the reason he makes this verification is that there is no officer of the petitioner corporation in this County where the petition is being prepared; that he has read the foregoing petition and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

JAMES F. O'CONNOR,

Subscribed and sworn to before me this 25th day of June, 1917.

[Seal]

HELENA C. STILLWAY,

Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires March 1, 1920. [3]

*United States Circuit Court of Appeals for the
Ninth Circuit.*

THE SCANDINAVIAN AMERICAN BANK OF
BIG TIMBER, a Corporation,
Petitioner,

vs.

JOHN G. ELLINGSON, Trustee for the Bankrupt,
W. N. RUSSELL, Doing Business Under the
Name of W. N. RUSSELL LUMBER COM-
PANY, and W. N. RUSSELL as an Indi-
vidual,

Respondent.

In the Matter of W. N. Russell, Bankrupt.

Assignment of Errors.

The Petitioner in this proceeding in connection with its petition for an Appeal herein hereby makes the following assignment of errors, which it avers occur in this cause.

First. The Court erred in finding the objections made to the allowance of the petitioner's claim as a preferred claim sustained by the evidence.

Second. The Court erred in finding that the parties intended the mortgage to protect them from interference from other creditors and to shield payments to such creditors as the mortgagee preferred and to keep by additions the stock for the protection of the mortgagee.

Third. The Court erred in holding the mortgage in question invalid.

Fourth. The Court erred in affirming the findings

of fact and Order made by the Referee holding the mortgage invalid.

WHEREFORE, the Scandinavian American Bank prays that the said order rendered and entered in the above-entitled cause by the District Court on the 12th day of April, 1917, be reversed.

CHAS. W. CAMPBELL,

MILLER, O'CONNOR & MILLER,

Attorneys for Petitioner. [4]

**Chattel Mortgage, June 29, 1915, Warren N. Russell
to Scandinavian American Bank of Big Timber,
etc.**

CHATTEL MORTGAGE.

THIS MORTGAGE, Made the 29th day of June, in the year 1915, by Warren N. Russell, of Big Timber, in the County of Sweet Grass, State of Montana, mortgagor, to the SCANDINAVIAN AMERICAN BANK OF BIG TIMBER, a banking corporation organized and existing under and by virtue of the laws of the State of Montana, with its principal place of business in the City of Big Timber, Sweet Grass County, Montana, mortgagee:

(Words used in this instrument in the masculine gender include the feminine and neuter, the singular number includes the plural and the plural the singular.)

WITNESSETH: That the said mortgagor mortgages to the mortgagee the following described personal property, situated in the County of Sweet Grass, State of Montana, to wit: All of the stock of coal, lime, cement, paints, oils, lumber and building materials

now contained in the coal sheds on the Northern Pacific Railway Company's Right of Way near Harris Street in the City of Big Timber, Montana, owned and used by the mortgagor herein, and in the lumber yard of said mortgagor situated on Lots NINE (9) and ten (10) in Block No. 16 of the original plat of the townsite of the City of Big Timber. According to the official plat thereof on file in the office of the County Clerk and Recorder of the County of Sweet Grass, State of Montana, to which said map reference is hereby made for further identification of said property, and also the above-mentioned coal sheds,—it being understood and agreed by and between the parties to this mortgage that the party of the first part may and he is hereby authorized to sell from such stock of coal, lime, cement, paints, oils, lumber and building materials, and from other goods of like kind hereafter added thereto, at retail, to the regular and other customers in the usual and general way of business, for cash, or not to exceed thirty days credit to responsible parties, but the party of the first part shall keep accurate account of all such sales and during banking hours of each day deposit the proceeds of such sales in the bank of the mortgagee herein to the credit of the party of the second part to apply on the note hereinafter mentioned, retaining in his office at the lumber yard only sufficient of such proceeds to pay current bills and expenses of carrying on said business of lumber dealer, and for making change. And it is further agreed that the party of the first part will at least once a month,

to wit, on or before the tenth day of each month, during the continuance of the lien of this mortgage, or the extension thereof, account to the party of the second part for all sales and collections made during the previous month, and pay over to the party of the second part at such times of accounting the proceeds of all such sales and collections, to apply toward the payment of said promissory note, after deducting the actual and necessary expenses of carrying on said business of lumber dealer, and the actual and necessary living expenses of the party of the first part, and after deducting enough to pay bills falling due for goods purchased to replenish said stock under the permission hereinafter given. It is further agreed that the party of the first part may from time to time purchase new supplies of coal, lime, cement, paints, oils, lumber and building materials, for cash or its equivalent, to replenish and keep up said stock now on hand, and all such supplies so purchased shall be covered by this mortgage from and after their arrival in the City of Big Timber, before they are placed in said coal bins and in said lumber yard as well as after, and said mortgagor hereby agreeing that the said stock of coal, lime, cement, paints, oils, lumber and building materials shall at no time during the continuance of the lien of this mortgage or any extension and renewal thereof fall below a valuation of Six Thousand Dollars. [5]

Said property above-described being all of the property of the kind described, owned by the mortgagor at the time of making this mortgage. And

this mortgage includes, also, all property of like kind, hereafter and during the life of this mortgage, acquired by the mortgagor by either increase, or purchase, or by exchange, or substitution for property herein described, as security for the payment to the SCANDINAVIAN AMERICAN BANK OF BIG TIMBER, Montana, of Four Thousand One Hundred Sixty-five and no/100 (4,165.00) Dollars according to the terms of one promissory note bearing even date herewith, payable to the order of the mortgagee:

One note for \$4,165 Dollars, payable 'On Demand, after date, said note being for value received, with interest at the rate of eight per cent per annum from date until paid. The makers, sureties, endorsers, and guarantors agreeing to pay a reasonable attorney's fee, if suit is brought thereon, and severally waiving presentment for payment, notice of non-payment, protest notice of protest, and all benefits from the exemption laws of the State of Montana, and with the proper revenue stamps affixed and duly cancelled.

And also, as security for such further and additional sums of money as may, from time to time, hereafter, during the life of this instrument, be advanced and loaned by said mortgagee to said mortgagor, together with the interest thereon, which said future advances when made are to be evidenced by note from said mortgagor to said mortgagee and are to be as fully secured hereby as though the same were specifically described and set forth herein; but

for no greater amount, however, than Two Hundred Fifty and no/100 Dollars.

AND THIS MORTGAGE shall be void if such payment be made.

BUT IN CASE DEFAULT BE MADE in payment of the principal or interest as provided in said promissory note, then the said mortgagee, its agent, attorney, successors or assigns are, or the Sheriff of any County in which the above-described property or any part thereof may be, is hereby empowered and authorized to sell the said goods and chattels, with all and every of the appurtenances, or any part thereof, and out of the money arising from such sale to retain the said principal and interest, together with the costs and charges of making such sale, and reasonable attorney's fees, and the overplus, if any there be, shall be paid by the party making such sale to the said mortgagor, heirs or assigns. The sale under the said power of sale shall be advertised by notice posted in five public places in said County at least five days prior to such sale, one of which shall be posted at the designated place of sale, giving time and place of sale and a description of the property to be sold. Such sale must be at public sale and the mortgagee may become a purchaser thereat.

IT IS FURTHER AGREED, That the said mortgagor, heirs or assigns, shall have the right to remain in possession of the above-described property until default be made herein by said mortgagor; provided expressly, however, that if default be made in the payment of the principal or interest, as provided in said promissory note, or if prior to the maturity of

said indebtedness, said described property or any part thereof, shall be attached, seized or levied upon by or at the instance of any creditor or creditors of said mortgagor, or claimed by any other person or persons, or if the said mortgagor or any other person or persons shall remove, or attempt to remove, said property, or any part there, from the said County of Sweet Grass, State of Montana, or shall conceal, make away with, sell, or in any manner dispose of said described property, or any part thereof, or shall attempt so to do, or if the said mortgagee shall at any time consider the possession of said property, or any part thereof, essential to the security of the payment of said promissory note, then and in such event, or in either of such events, the said mortgagee, its agents or attorney, successors or assigns, or such Sheriff, shall have the right to the immediate possession of said described property and the whole or any part thereof, and shall have the right at its option to take and recover such possession from any person or persons having or claiming the same, with or without suit or process, and for that purpose may enter upon any [6] premises where said property, or any part thereof, may be found, and may at its option, regard the debt secured by this mortgage due and payable and may thereupon proceed and sell such property as above provided, and apply the proceeds of sale to the satisfaction of said debt as above provided. The exhibition of this mortgage, or a certified copy thereof shall be sufficient proof that any person claiming to act for the mortgagee is duly made, constituted and appointed agent

or attorney, as the case may be, to do whatsoever is herein authorized to be done by or on behalf of the mortgagee, its agent, attorney, successors or assigns.

IT IS FURTHER AGREED, In event this mortgage covers a crop, either cereals, roots, or otherwise, either sown, planted or growing, or to be sown, planted or grown, that when the said property hereby mortgaged is gathered or harvested the said mortgagee, or its assigns, shall be entitled to the immediate possession of the same, and shall have the right to harvest, thresh, transport and haul the same from the premises wherein the same have been grown and to sell and dispose of the same for the best price obtainable therefor; and that the cost and expense of such hauling and transporting shall be borne and paid by said party of the first part, and shall be covered by the lien of this mortgage; and that until such property is so sold and disposed of by said mortgagee or its assigns, the lien of this mortgage upon said property, wherever the same may be, shall continue and remain in full force and effect, it being understood that any moneys received by said mortgagee, or its assigns, upon the sale of said property, less the amounts secured by these presents shall be returned to the said mortgagor, heirs or assigns.

IT IS FURTHER AGREED, That the powers conferred by this mortgage are in addition to and not in substitution of the right of the mortgagee to foreclose this mortgage by a suit as in the case of a mortgage on real estate.

THE MORTGAGOR hereby declares and represents to the mortgagee, that the mortgagor owns said property, and possesses lawful right and authority to sell, mortgage and dispose of the same, and that the same is free and clear of all liens and incumbrances, and the loan secured by this mortgage is obtained by virtue of these representations.

IN WITNESS WHEREOF, the said mortgagor hereunto affixes the signature and seal of said mortgagor, the day and year in this instrument first above written.

(Signed) W. N. RUSSELL, (Seal)

State of Montana,

County of Sweet Grass,—ss.

On this 29th day of June, in the year 1915, before me, Charles W. Campbell, a Notary Public for the State of Montana, residing at Big Timber, personally appeared Warren N. Russell, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certification first above written.

[Seal]

(Signed) CHARLES W. CAMPBELL.

Notary Public for the State of Montana, Residing at
Big Timber, Montana.

My commission expires May 31, 1918. [7]

State of Montana,

County of Sweet Grass,—ss.

E. J. Mo, being first duly sworn deposes and says:

That he is an officer of the Scandinavian Bank of Big Timber, the corporation named in the foregoing mortgage as mortgagee, viz.: its cashier, and makes this affidavit for and on behalf of said corporation. That the said mortgage is made in good faith to secure the amount named therein, and without design to hinder, delay or defraud creditors.

(Signed) E. J. MO.

State of Montana,

County of Sweet Grass,—ss.

I, J. E. Cameron, clerk and recorder of Sweet Grass County, Montana, do hereby certify that the above is a true and correct copy of a Chattel Mortgage, Warren N. Russell to Scandinavian American Bank of Big Timber, Montana.

Filed for record M 30th June, 1916, at 1:50 P. M. o'clock and filed in File 13 of Chattels Records of Sweet Grass County, Montana.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said office.

Done at Big Timber, Sweet Grass County, Montana, this 15th day of May, 1916.

[Seal]

J. E. CAMERON,
Clerk and Recorder.

D. V. Highie,
Deputy. [8]

*In the District Court of the United States, for the
District of Montana.*

In the Matter of W. N. RUSSELL, Doing Business
Under the Name of W. N. RUSSELL LUM-
BER COMPANY, and W. N. RUSSELL, as an
Individual, Bankrupt.

Petition of John G. Ellingson, Trustee.

To Honorable E. M. NILES, Esquire, Referee in
Bankruptcy. Your Petitioners Respectfully
Show:—

1. Your petitioner John G. Ellingson says that he
is the fully, qualified and acting trustee herein and
that his appointment as such trustee has not been
revoked and is now in force.

2. Your petitioner, Bloedell Donovan Lumber
Mills, alleges and states that it is a corporation,
created, organized and existing under and by virtue of
the laws of the State of Washington, of the city of
Bellingham, State of Washington; that it was at the
time of the filing of the petition herein and now is, a
creditor of the estate of said bankrupt, and that its
claim herein has been filed and allowed by the Court
herein.

3. Your petitioner, McCormick Lumber Com-
pany, alleges and states that it is a corporation
created, organized and existing under and by virtue
of the laws of the State of Washington, in the city
of McCormick, State of Washington, and that its
claim herein has been filed and allowed by the Court
herein.

4. Your petitioner, The Standard Paint Company, alleges and states that it is a corporation created, organized and existing under and by virtue of the laws of the State of New York, of the City of New York, of the State of New York, and that its claim has been filed and allowed by the Court herein.

[9]

5. That on or about the 21st day of February, 1916, the above-named bankrupt did file in the United States District Court in and for the District of Montana, a voluntary petition in bankruptcy, and thereafter and on or about the 15th day of March, 1916, a judgment was duly made, entered and given, in said United States District Court, adjudging said W. N. Russell, doing business under the name and style of W. N. Russell Lumber Company, and W. N. Russell as an individual, a bankrupt.

6. That said W. N. Russell, the within-named bankrupt, for about one year prior to the 29th day of June, 1915, and up to the day of his adjudication herein as a bankrupt, was engaged in the business of selling and dealing in lumber, coal, cement, lime, and all business incidental thereto, in the City of Big Timber, Sweet Grass County, State of Montana, under the name and style of W. N. Russell Lumber Company.

7. Petitioners admit that at the time of the execution and delivery of the promissory note for the sum of Four Thousand One Hundred Sixty-five (\$4,165) Dollars mentioned in said Proof of Claim, the said bankrupt made, executed and delivered a mortgage conveying to said Scandinavian-American

Bank lots nine (9) and ten (10) in block sixteen (16) of the Original Plat of the Townsite of the City of Big Timber, Sweet Grass County, Montana, and a chattel mortgage on certain personal property described in said chattel mortgage to secure the payment of said promissory note for the sum of Four Thousand One Hundred Sixty-five (\$4,165) Dollars; said chattel mortgage also being given as security for the further and additional sum of the amount of Two Hundred Fifty & No/100 (\$250) Dollars. Said mortgages being [10] attached to said Proof of Claim and made a part thereof, and herein referred to and made a part thereof.

8. That the proof of debt of the Scandinavian American Bank of Big Timber, Montana, a banking corporation, organized and existing under and by virtue of the laws of the State of Montana, having its principal place of business at Big Timber, in the County of Sweet Grass, State of Montana, claiming to be a creditor of the said W. N. Russell, etc., was filed hereon in the — day of —, 1916, and that the same has not as yet been allowed. That said claim and no part thereof should be allowed as a secured or priority claim upon the property described in said chattel mortgage for the following reasons, to wit:

9. Your petitioners allege that they have no information or knowledge sufficient to form a belief as to whether or not at and before the filing of the petition herein, or at the time of the filing of the Proof of Claim herein by said Scandinavian-American Bank, the said W. N. Russell, doing business

under the name of W. N. Russell Lumber Company and W. N. Russell as an individual, was indebted to said Scandinavian-American Bank of Big Timber, Montana, in the sum of Four Thousand Six Hundred Twenty & 90/100 (\$4620.90) Dollars, or in any sum at all, in excess of the sum of Two Thousand and no/100 (\$2000) Dollars, and your petitioners therefore allege that bankrupt and his estate is not indebted to said Bank in any sum whatever in excess of Two Thousand and no/100 (\$2000) Dollars, (including payment made by trustee since adjudication.)

10. Your petitioners state that they are informed and believe and therefore allege the fact to be that said pretended chattel mortgage was given by said Russell [11] and accepted by said Scandinavian American Bank with the intent then and there had and entertained by said Russell and said Bank to hinder, delay and defraud the then existing and subsequent creditors of the said Russell of their just demands, in the manner and by the means among other things as follows, to wit:

Your petitioners state that they are informed and believe and therefore allege the fact to be that subsequent to the 29th day of June, 1915, the date of the execution of said promissory note and chattel mortgage referred to in said Proof of Claim, and to the giving of said note and chattel mortgage, and up to and until the time that the within-named bankrupt filed his petition herein and was adjudged a bankrupt, and up to and until the time that your petitioner John G. Ellingson took possession of the per-

sonal property of said bankrupt, described in said pretended chattel mortgage, and that added thereto by said bankrupt, the provisions and agreements in said chattel mortgage contained were disregarded, broken and violated by said W. N. Russell, his agents, servants and employees, and that said provisions and agreements of said chattel mortgage so broken, violated and disregarded, were violated broken and disregarded by said W. N. Russell, bankrupt, his agents, servants and employees, by and with the knowledge, advice, consent and understanding and knowledge, of said Scandinavian-American Bank of Big Timber, Montana, its officers, agents, servants and employees, in this:

(a) That the provisions and agreements in said chattel mortgage contained authorizing said W. N. Russell, said bankrupt, to sell from the stock of goods, wares and merchandise, covered by said chattel mortgage, and from other goods, wares and merchandise of like kind thereafter [12] added to, at retail to the regular and other customers of said W. N. Russell, for cash, or on not to exceed thirty days' credit, to responsible parties, was disregarded, broken and violated by said W. N. Russell, said bankrupt, in that credit was given by said W. N. Russell, said bankrupt, his agents, servants, and employees, with the knowledge and consent of said Scandinavian-American Bank of Big Timber, Montana, its officers, agents, servants and employees, to the regular and other customers of said W. N. Russell for a period greatly in excess of thirty days, and that there is now due and owing from said customers

a sum in excess of the sum of Two Thousand Dollars (\$2,000.00).

(b) That the provisions and agreements in said chattel mortgage contained requiring said W. N. Russell, said bankrupt, to keep an accurate account of all sales made either for cash or on not to exceed thirty days' credit, and during the banking hours of each day deposit the proceeds of such sales in the bank of the mortgagee (Scandinavian-American Bank) to the credit of said Scandinavian-American Bank, to apply on said promissory note, after retaining in the office of said bankrupt, sufficient of the proceeds of such sales, to pay current bills and expenses of carrying on the said business and for making change, was disregarded, broken and violated by said W. N. Russell, bankrupt, and his agents, servants and employees, and by and with the knowledge, consent and understanding of the said Scandinavian-American Bank, its officers, agents, servants, and employees, in that notwithstanding there were sales and collections made during each day, the proceeds of all sales and collections, after retaining in said office sufficient of such proceeds to pay current bills and expenses of carrying on said business and making change, were not during the banking hours of each day, or at all, deposited in the bank of said Scandinavian-American [13] Bank, or in any bank, to the credit of said Scandinavian-American Bank, to apply on said note, but on the contrary said proceeds were deposited in said Scandinavian-American Bank to the credit of W. N. Russell, said bankrupt, subject to his demand and check, and said proceeds were

drawn out of said bank and used by said W. N. Russell, said bankrupt, subject to his demand and check, said proceeds were drawn out of said bank and used by said W. N. Russell, said bankrupt, and converted by him to his own use and used by him contrary to and in violation of the provisions of said chattel mortgage, all with the knowledge and consent of the said Scandinavian-American Bank, of Big Timber, Montana, its officers, agents, servants and employees.

(c) That the provisions and agreements in said chattel mortgage contained requiring said W. N. Russell at least once a month, to wit: on or before the 10th day of each and every month during the continuance of said chattel mortgage, or any extension thereof, to account to said Scandinavian-American Bank for all sales and collections made during the previous month, and pay over to said Scandinavian-American Bank at such times of accounting the proceeds of all such sales and collections to apply towards the payment of said promissory note, after deducting the actual and necessary expenses of carrying on said business of said W. N. Russell as a lumber dealer and the actual and necessary living expenses of said W. N. Russell, and after deducting enough money to pay the bills falling due for goods purchased to replenish said stock of goods, wares and merchandise, was disregarded, broken and violated, in that there was no accounting to said Scandinavian-American Bank by said W. N. Russell on the 10th day of [14] each month, while said pretended chattel mortgage was in force, or at all; that notwithstanding there were sales and collections made dur-

ing each month that said pretended chattel mortgage was in force, in excess of the actual and necessary expenses of carrying on said business and the living expenses of said W. N. Russell, and in excess of enough money to pay bills falling due for goods, wares and merchandise, purchased to replenish said stock of goods, wares and merchandise, the proceeds of such sales and collections, after deducting the expenses of carrying on said business and the necessary living expenses of said Russell, and enough money to pay bills falling due for goods, wares and merchandise purchased to replenish said stock of goods, wares and merchandise, were not paid over to said Scandinavian-American Bank of Big Timber, Montana, on the 10th day of each month, or at all; that on the contrary such proceeds were paid into said Scandinavian-American Bank to the credit of said Russell and subject to his demand and check and said proceeds were drawn out and used by said W. N. Russell, and converted by him to his own use and used by him in violation of the provisions and agreements in said chattel mortgage contained, and that said provision and agreement so disregarded and violated by said W. N. Russell, and was disregarded, violated and broken by and with the advice, consent, understanding and knowledge of said Scandinavian-American Bank, its officers, agents, servants and employees.

That during all of the time said pretended chattel mortgage was in force there was money over and above the amount required to be deducted, the proceeds of sales [15] made and collections made

from the regular and other customers of said Russell in the possession of said Russell and in the said Scandinavian-American Bank to the credit of said Russell, which was not applied on the payment of said note and debt as required by the provisions and agreements in said chattel mortgage contained.

(d) That the provisions and agreements in said chattel mortgage contained, granting permission to said W. N. Russell to purchase from time to time new goods, wares and merchandise for cash, or its equivalent, to replenish and keep up the said stock on hand, at the time of the giving of said pretended chattel mortgage, was disregarded, violated and broken, in that goods, wares and merchandise to a large amount were purchased by said W. N. Russell, his agents, servants and employees, from divers and sundry persons and corporations, other than for cash, to wit: on credit, and such merchandise was not paid for in cash, or at all, and that such goods, wares and merchandise so bought have not been paid for, and said goods, wares and merchandise, so bought on credit, were bought and purchased by said Russell with the knowledge and consent of said Scandinavian-American Bank, its officers, agents, servants and employees, and such goods, wares and merchandise so purchased were placed in the buildings and lumber yards of said Russell, used and partly sold by him in his said business, and such said goods, wares and merchandise as were unsold at the time of the filing of the petition herein and at the time of the adjudication of said Russell as a bankrupt, were taken possession of by said John G. Ellingson, [16]

Trustee herein, pursuant to his appointment as such trustee.

(e) That between the 29th day of June, 1915, and the date of the filing of the petition herein, during the existence of said pretended chattel mortgage, the said W. N. Russell was allowed and permitted by said Scandinavian-American Bank, its officers, agents, servants and employees, to sell and dispose of a portion of the goods, wares and merchandise included in said chattel mortgage and convert the proceeds arising from such sales to his own use.

11. That exclusive of the property so pretended to be mortgaged by said chattel mortgage said W. N. Russell did not retain sufficient property to pay the debts then and there owing by him.

12. Petitioners further state that they are informed and believe and therefore allege the fact to be that at the time of the giving of said promissory note and the executing and delivering of said pretended chattel mortgage on the 29th day of June, 1915, the said W. N. Russell was indebted to divers and sundry persons, firms and corporations to an amount exceeding the sum of three thousand dollars (\$3,000), which said indebtedness was in addition to his indebtedness to the Scandinavian-American Bank, and that divers and sundry persons, firms and corporations who were on the said 29th day of June, 1915, creditors of said Russell, have filed and proven their claims in the United States District Court in and for the District of Montana, in bankruptcy, by filing the same with the Honorable E. M. Niles, Referee in Bankruptcy for the United States Dis-

trict Court in and for the District of Montana; that said claims have been allowed by said [17] Referee in Bankruptcy to an amount exceeding Three Thousand (\$3,000) Dollars.

13. Your petitioners state that they are informed and believe and therefore allege the fact to be that divers and sundry persons, firms and corporations, creditors of said W. N. Russell, at the time said Russell made and executed the pretended chattel mortgage set out herein, and divers and sundry persons, firms and corporations, creditors of said Russell at the time of the filing of the petition herein and at the time of the adjudication of said Russell as a bankrupt, are now creditors of said Russell and the estate of said Russell, bankrupt, and that said creditors have filed and proven their claims in the United States District Court in and for the District of Montana, in bankruptcy, by filing the same with the Honorable E. M. Niles, Referee in Bankruptcy, of the United States District Court in and for the District of Montana, and that the amount of the claims filed and proven, exclusive of the claim of the Scandinavian-American Bank, amount to a sum in excess of Eight Thousand (\$8,000) Dollars; that the same have been allowed by said Referee.

14. Your petitioners further state that the Trustee herein has not money and property in his possession or under his control except the sum of One Thousand (\$1,000) Dollars, with which to pay said claims so filed and allowed, or any part thereof and your petitioners allege that said Trustee has not sufficient assets in his hands to satisfy and pay the

claims of the said W. N. Russell, bankrupt.

15. Your petitioners further allege that the said pretended chattel mortgage was and is fraudulent [18] and void, and was made and entered into by said Scandinavian-American Bank and said Russell for the purpose of hindering, delaying and defrauding the then-existing and subsequent creditors of said Russell, and that the acts of said Scandinavian-American-Bank and said Russell were a scheme to hinder, delay and defraud the then-existing and subsequent creditors of said Russell; that said pretended mortgage was fraudulent and void as to your petitioner and trustee herein, and the existing and subsequent creditors of said W. N. Russell, all of which the said Scandinavian-American Bank and the said W. N. Russell had full knowledge, and that at the time said chattel mortgage was executed and delivered it was not intended, and it was understood and agreed that the provisions and agreements therein contained were not to be carried out between the parties thereto and that said Russell was to conduct the business and to sell the merchandise in the same manner as though the said chattel mortgage had not been executed. That said business was conducted after the execution and delivery of said chattel mortgage as though the said chattel mortgage had not been executed and delivered; all with the knowledge, consent and understanding of said bank, its officers, agents, servants and employees.

16. Your petitioners allege that at the time of the filing of the petition herein and at all times since the value of said real property securing the debt of said

Scandinavian-American Bank, was, and now is the sum of Eighteen Hundred thirty and no/100 (\$1,830) Dollars, and the value of the personal property which came into the possession of said Trustee described in and covered by said pretended chattel mortgage set out in the Proof [19] Claim herein, was, and now is the sum of One Thousand Seven Hundred Seventy & no/100 (\$1,770) Dollars.

17. That at the time of the execution and delivery of said chattel mortgage the stock of merchandise described in said mortgage did not exceed in value the sum of Thirty-five Hundred and no/100 (\$3,500) Dollars.

18. Your petitioners allege that John G. Ellingson by virtue of his appointment as Trustee herein, he became vested with whatever title said Russell had to any and all property of said Russell and as such trustee he is lawfully entitled to the possession of the same and also any and all property transferred by said Russell in fraud of his creditors as of the date that said Russell filed his petition herein.

19. That the attorneys of said claimant are Messrs. Miller & O'Connor, of Livingston, Montana, and Chas. W. Campbell, Esq., of Big Timber, Montana.

20. That no previous application has been made to this or any other court for the order herein asked for.

WHEREFORE, your petitioners pray that the said pretended chattel mortgage be set aside and declared to be null and void and that the claim of the Scandinavian-American Bank be allowed for such

sum and amount as shall be found by the Court to be due to said Scandinavian-American Bank.

That the claim of said Scandinavian-American Bank to the real property conveyed by the said mortgage bearing date the 29th day of June, 1915, and filed in the office of the county clerk and recorder of Sweet Grass County, State of Montana, on the 30th day of June, 1915, to the [20] extent of the value of the property in said mortgage described, be allowed as a secured claim and that the said Scandinavian-American Bank be allowed the proceeds arising from the sale of the real property described in said mortgage, less the costs of administration thereof.

That the said Scandinavian-American Bank, after the payment to it of the proceeds of the sale of said real property, less the costs of administration, be allowed the balance of its said claim in such sum as may be found due to it as a general creditor of said bankrupt and of said estate, without security or priority of payment, and that petitioners have full equitable relief.

FRANK ARNOLD,

Attorney for Petitioners. [21]

State of Montana,
County of Sweet Grass,—ss.

I, John G. Ellingson, one of the petitioners mentioned in and described in the foregoing petition do hereby make solemn oath that the statement of facts contained therein are true to the best of my knowledge, information and belief.

JOHN G. ELLINGSON.

Subscribed and sworn to before me this 31 day of July, 1916.

[Seal]

J. B. SELTERS,

Notary Public for the State of Montana, Residing at Big Timber, Montana.

My commission expires the 31 day of Oct., 1917.
[22]

In the District Court of the United States for the District of Montana.

AT A COURT OF BANKRUPTCY HELD IN
AND FOR THE DISTRICT OF MONTANA,
AT LIVINGSTON, MONTANA THIS 23d
DAY OF DECEMBER, A. D. 1916.

In the Matter of W. N. RUSSELL, Doing Business
Under the Name of W. N. RUSSELL LUM-
BER COMPANY, and W. N. RUSSELL as an
Individual, Bankrupt.

Report of Referee in Bankruptcy.

Present: E. M. NILES, Esq. Referee.

This matter having come on to be heard upon the objections of John G. Ellingson as trustee, Bloodell, Donovan Lumber Mills, (a Corporation), McCormick Lumber Co., (a Corporation), The Standard Paint Company, (a Corporation), to the claim of the Scandinavian American Bank, (a banking Corporation), which said claim and objections have heretofore been filed herein; Mr. Charles W. Campbell and Messrs. Miller and O'Connor appearing as attorneys for the Scandinavian American Bank, and Frank Arnold appearing as attorney for the Trus-

tee and other objectors. Witnesses being duly sworn and examined on the part of the claimant and objectors and the evidence being closed, the cause was submitted to the court for consideration and decision and the court being fully advised in the premises and after due deliberation thereon, finds as follows:

FINDINGS OF FACTS.

1. That on or about the 15th day of March, A. D. 1916, a judgment was duly made, entered and given in said United States District Court, adjudging said W. N. Russell, doing business under the firm name and style of W. N. Russell Lumber Company, and W. N. Russell as an individual, a bankrupt. [23]

2. That said W. N. Russell, the within named bankrupt, for about one year prior to the 29th day of June, 1915, and up to the day of his adjudication herein as a bankrupt, was engaged in the business of selling and dealing in lumber, coal, cement, lime, and all business incidental thereto, in the City of Big Timber, Sweet Grass County, State of Montana, under the name and style of W. N. Russell Lumber Company.

3. That on the 29th day of June of 1915, W. N. Russell made, executed, and delivered to the Scandinavian American Bank of Big Timber Montana, his promissory note in writing for the sum of Four Thousand One Hundred and Sixty-five Dollars, (\$4,165), with interest thereon at the rate of 8% per annum, and thereafter on said date said W. N. Russell, made, executed and delivered a chattel mortgage on certain personal property described in said chattel mortgage to secure payment of said

promissory note, said chattel mortgage also being given as security for the payment of an additional sum of Two Hundred and Fifty Dollars, (\$250), to be thereafter advanced.

4. That said chattel mortgage was filed in the office of the County Clerk and Recorder of Sweet Grass County, Montana on the 30th day of June, 1915.

5. That the Scandinavian American Bank has filed its claim herein in the sum of Four Thousand, Six Hundred and Twenty Dollars and 90/100, (\$4,620.90), and that there was due to said Scandinavian American Bank at the time of the filing of its proof of claim herein on the 15th day of May, 1916, the sum of Four Thousand Six Hundred and Twenty Dollars and 90/100 (\$4,620.90) made up as follows: The sum of Four Thousand One Hundred and Sixty-five Dollars (\$4,165), the amount of the promissory note, made, executed and delivered June 29, 1915; the sum of two hundred and fifty dollars, (\$250), thereafter advanced by said Scandinavian-American Bank to said W. N. Russell, under the mortgage; and the [24] balance, the sum of Two Hundred Five Dollars and 90/100, (\$205.90), further advanced by said Scandinavian-American Bank to said W. N. Russell.

6. That at the time of the execution and delivery of said chattel mortgage and said promissory note, it was understood and agreed by and between the Scandinavian American Bank, its office, officers, agents and employees and said W. N. Russell, that the terms and conditions of said chattel mortgage

were not to be carried out and were to be disregarded, broken and violated, and no change was to be made in the manner in which said Russell was to carry on his business.

7. That the provisions and agreements in the said chattel mortgage contained, authorizing said W. N. Russell to sell from the stock of goods, wares and merchandise, covered by said chattel mortgage and from other goods, wares and merchandise of like kind thereafter added to, at retail to the regular and other customers of said W. N. Russell, for cash, or not to exceed thirty days credit to responsible parties was disregarded, broken and violated by said W. N. Russell, said bankrupt, in that credit was given by said W. N. Russell, said bankrupt, his agents, servants, and employees, with the knowledge and consent of said Scandinavian-American Bank of Big Timber Montana, its officers, agents, servants, and employees, to the regular and other customers of said W. N. Russell for a period greatly in excess of thirty days, and large amounts of goods, wares and merchandise were sold to the regular and other customers of said W. N. Russell by said W. N. Russell on credit for periods of sixty and ninety days, between June 29th, 1915 and February 21st, 1916, and that said sales so made were made by and with the knowledge and consent of said Scandinavian-American [25] Bank, its officers, agents, servants and employees.

8. That on February 21st, 1916, the dates of the filing of the petition herein and at the time said W. N. Russell was adjudged bankrupt, there was due and

owing from the regular and other customers of said W. N. Russell, the sum of One Thousand six Hundred and Ninety-four Dollars and 95/100 (1,694.95), for goods, wares and merchandise sold on credit and delivered by said W. N. Russell between the 29th day of June, A. D. 1915, and the 21st day of February A. D. 1916.

9. That the provisions and agreements in the said chattel mortgage contained requiring said W. N. Russell to keep an accurate account of all sales made either for cash, or on not to exceed thirty days credit, and during the banking hours of each day deposit the proceeds of such sales in the Scandinavian-American Bank to the credit of the said Scandinavian-American Bank to apply on the promissory note dated June 29th, 1915, after retaining sufficient of the proceeds of such sales to pay current bills and expenses of carrying on said business and for making change, was disregarded, broken and violated by said W. N. Russell, his agents, servants and employees, and that the same was broken by and with the knowledge, consent and understanding of the said Scandinavian-American Bank, its officers, agents, and employees; and the court finds that there were sales and collections made between the 29th day of June, 1915, and the 21st day of February, 1916; and that the proceeds of such sales and collections after retaining in the office of said W. N. Russell sufficient of such proceeds to pay current bills and expenses of carrying on the business of said W. N. Russell, were in excess of the sum of Two Thousand Dollars and were not during the banking

hours of each day, or at all, or at any time deposited in the Scandinavian-American Bank, or in any bank to apply on said note, and the proceeds of said sales and collections were deposited in said Scandinavian-American Bank to the credit of said W. N. Russell subject to his demand and check and said proceeds were drawn out of [26] said bank and used by said W. N. Russell, said bankrupt, and converted by him to his own use and a part thereof used by said W. N. Russell to pay creditors of the said W. N. Russell, who were creditors of said W. N. Russell on the 29th day of June, 1915, and for a long time prior thereto; that said money was so used and converted by said W. N. Russell by and with the knowledge and consent of Scandinavian-American Bank, its agents, servants and employees.

10. That the provisions and agreements in said chattel mortgage contained requiring said W. N. Russell at least once a month to-wit; on or before the 10th day of each and every month during the continuance of said chattel mortgage or any extension thereof, to account to said Scandinavian-American Bank for all sales and collections made during the previous month and pay over to said Scandinavian-American Bank at such times of accounting the proceeds of all such sales and collections to apply toward the payment of the promissory note dated June 29, 1915, given by said Russell to Scandinavian-American Bank, after deducting the actual and necessary expenses of carrying on the business of said W. N. Russell as a lumber dealer and as the other necessary living expenses of said W. N. Rus-

sell, and after deducting enough money to pay bills falling due for goods purchased to replenish said stock of goods, wares and merchandise, was broken, disregarded, and violated and said W. N. Russell made no accounting to said Scandinavian-American Bank on the 10th day of each month between the 29th day of June, 1915, and the 21st day of February, 1916, or at all.

The Court finds that there was on the 10th day of each and every month between the 29th day of June, 1915, and the 21st day of February, 1916, money in the hands of said W. N. Russell, the proceeds of sales and collections made by said Russell, in excess of money required for the necessary expenses of carrying said business [27] and the living expenses of said Russell and in excess of money required to pay bills falling due for goods, wares and merchandise purchased to replenish the stock of goods, wares, and merchandise in that said monies, the proceeds of sales and collections were paid into said Scandinavian-American Bank to the credit of said Russell and converted by him to his own use and large sums were paid by said Russell to the creditors of said W. N. Russell who were creditors of said W. N. Russell on June 29th, 1915, and for a long time prior thereto.

11. That said Scandinavian-American Bank did not demand an accounting on the 10th day of each month between the 29th day of June, 1915, and the 21st day of February, 1916, or at all, and that the failure of said Russell to account to said Scandinavian-American Bank on the 10th day of each and every month between the 29th day of June, 1915, and

the 21st day of February 1916, was consented to and acquiesced in by said Scandinavian-American Bank, its officers, agents, servants and employees.

12. That between the 29th day of June, 1915, and the 21st day of February, 1916, there was at divers and sundry times and on the 10th day of each and every month large sums of money in the possession of the said defendant, W. N. Russell, over and above the monies required by said Russell to pay the necessary expenses of carrying on said business and the living expenses of said Russell, and money required to pay bills falling due for goods, wares and merchandise purchased to replenish the stock of goods, wares and merchandise mortgaged to said bank, the proceeds of sales and collections made from the regular and other customers of said Russell in the possession of said Russell, and in the Scandinavian-American Bank, to the credit of said Russell which should and could have been applied toward the said payment of said promissory note of June 29th, 1915, by said Russell, and that the same was not applied toward the [28] payment of said note, but was converted by said Russell to his own use and a large part thereof paid to divers and sundry persons who were creditors of said Russell on the 29th day of June, 1915, and for a long time prior thereto; that said Scandinavian-American Bank knew that said monies were in the possession of said W. N. Russell at divers and sundry times and on the 10th day of each and every month, between the 29th day of June, 1915 and the 21st day of February 1916, and said Scandinavian-American Bank, its officers,

agents, servants and employees knew of and consented to the conversion of said monies by said W. N. Russell.

13. That the provisions and agreements in the said chattel mortgage which granted permission to said W. N. Russell to purchase from time to time new goods, wares and merchandise for cash or its equivalent to replenish and keep up the stock of merchandise on hand at the time of the giving of the promissory note and chattel mortgage on the 29th day of June 1915, was disregarded, broken, and violated; and said W. N. Russell at divers and sundry times between the 29th day of June, 1915, and the 21st day of February, 1916, purchased goods, wares and merchandise in large sums and in an amount exceeding the sum of Two Thousand Dollars, (\$2,000), on credit and did not pay cash therefor, or at all, and did not pay any sum or sums of monies for said goods, wares and merchandise; and said goods, wares and merchandise so bought on credit between the 29th day of June, 1915, and the 21st day of February, 1916, were received and taken into the warehouse and lumber yards of said W. N. Russell at Big Timber, Montana, and the same was used, and a part thereof sold in the ordinary course of business of said W. N. Russell between the 29th day of June, 1915, and the 21st day of February, 1916, and a portion thereof was in the lumber yards and warehouse of said W. N. Russell, at Big Timber, Montana, on the 21st day of February, 1916; [29] and at the time of the adjudication herein, the goods, wares and merchandise so on hand unsold were taken pos-

session of by the Trustee herein; that said purchases of goods, wares, and merchandise on credit were purchased on credit by and with the knowledge, consent and understanding of the Scandinavian-American Bank, its officers, agents, servants and employees.

14. That at the time of the execution and delivery of said note and chattel mortgage by said Russell to the Scandinavian-American Bank on the 29th day of June, 1915, said W. N. Russell was indebted to divers and sundry persons, firms and corporations, to a large amount and in a sum in excess of the sum of Three Thousand Dollars, (\$3,000), exclusive of the indebtedness then owing to the Scandinavian-American Bank on the 21st day of February, 1916, was and a large amount thereof is now owing, and the claims of said creditors have been proven and filed herein and allowed by the court herein.

15. That exclusive of the property covered by the said chattel mortgage now in the hands of Trustee herein, the Trustee herein has in his possession, approximately the sum of One Thousand Dollars, (\$1,000), to pay the costs of administration and for distribution among the creditors who have filed their claims herein, and that exclusive of the property covered by said chattel mortgage, which the court finds to the value of One Thousand Seven Hundred and Seventy Dollars (\$1,770), the Trustee herein will not have sufficient assets and funds to pay the creditors of said W. N. Russell, who have filed their claims herein, the amount of their respective claims in full, and the assets now in the hands of said Trustee exclusive of the property covered

by said chattel mortgage, will not pay to exceed the sum of ten cents on the dollar to creditors who have filed their claims herein; that there are no other assets that will come into the hands of the trustee hereafter. [30] That the amount of the Claims filed and allowed herein exceeds the sum of Five Thousand Dollars, (\$5,000).

16. That at the time of the making and delivery of said promissory note of the 29th day of June, 1915, the said W. N. Russell, made, executed and delivered to the Scandinavian-American Bank, a mortgage on certain real estate as security for the payment of said promissory note; that said real estate has been sold under order of court herein and the value of the same as agreed upon by the parties hereto, is the sum of One Thousand Eight Hundred and Thirty Dollars, (\$1,830), Fifteen Hundred Dollars (\$1,500) of said amount having been paid to said Bank, and the sum of Three Hundred and Thirty Dollars, (\$330), being held by the Trustees towards costs of administration.

17. That John G. Ellingson, by virtue of his appointment as Trustee herein, became vested with all the rights, title and the interest of said Russell, to any and all property of said Russell, owned by him on the 21st day of February, 1916, and he is entitled to the possession of the personal property described in the chattel mortgage dated June 29th, 1915 or the proceeds thereof.

18. That all of the allegations contained in the objections filed herein against the claim of the Scandinavian-American Bank are true.

CONCLUSIONS OF LAW.

Wherefore, by reasons of the law and premises, it is ordered and adjudged:

1. That the chattel mortgage dated June 29th, 1915, given by said W. N. Russell to Scandinavian-American Bank is fraudulent and void as to the Trustee herein, and the creditors of said W. N. Russell and is void and of no effect. [31]

2. That the claim of the Scandinavian-American Bank is allowed as a preferred, priority and secured claim to the amount of One Thousand Eight Hundred and Thirty Dollars, (\$1,830), the value of the real property described in the mortgage dated June 29th, 1915, given to secure the payment of the promissory note of June 29th, 1915, (less costs of administration).

3. That the claim of the Scandinavian-American Bank is disallowed as a preferred, priority and the secured claim in the sum of Two Thousand Seven Hundred and Ninety Dollars and 90/100 (\$2,790.90), and the claim of the Scandinavian-American Bank is allowed in the sum of Two Thousand Seven Hundred and Ninety Dollars and 90/100, (\$2,790.90), the same to be paid pro rata with the other creditors of said bankrupt, who have filed or may hereafter file their claims herein.

E. M. NILES,
Referee. [32]

*In the District Court of the United States for the
District of Montana.*

COPY.

In the Matter of W. N. RUSSELL, Doing Business
Under the Name of W. N. RUSSELL LUM-
BER COMPANY, and W. N. RUSSELL as an
Individual,

Bankrupt.

**Petition to U. S. District Court to Review Order of
Referee.**

To the Honorable GEORGE M. BOURQUIN, Judge
of the District Court of the United States for
the District of Montana.

The petition of the Scandinavian-American Bank
of Big Timber, a banking corporation, organized
and existing under and by virtue of the laws of the
State of Montana, and having its principal place of
business at Big Timber, County of Sweet Grass,
State of Montana, one of the creditors of the said
bankrupt, respectfully represents that on the twenty-
third day of December, 1916, manifest error to the
prejudice of the complainant herein was made by
the referee in said matter in a finding and order dis-
allowing and expunging the claim of said corpora-
tion against said bankrupt from the list of allowed
preferred claims upon the trustee's record in said
case. The errors complained of are as follows, to
wit:

First. That the evidence adduced before said
referee and set out in the transcript herewith sub-

mitted shows that the chattel mortgage dated June 29th, 1915, and given by said W. N. Russell to the Scandinavian-American Bank of Big Timber, is not fraudulent and void as to the trustee herein, and is not fraudulent and void as to the creditors of said W. N. Russell; and that said evidence further shows that chattel mortgage aforesaid to be a valid and subsisting lien upon the assets of the said W. N. Russell in favor of the Scandinavian-American Bank of [33] Big Timber, which lien should be allowed said bank as a lawful preference for the satisfaction of its claims against the said W. N. Russell, bankrupt, so far as the same are secured thereby.

Second. That said referee erred in his fifth finding of fact in that there is no evidence to show that the Scandinavian American Bank is chargeable with the sum of Sixteen hundred and Ninety-four and 95/100 Dollars (\$1694.95) for merchandise sold for the credit of the said bank; but that the evidence adduced before the said referee shows that the said Scandinavian American Bank is entitled to have the lien of its mortgage extended to cover the receipts from the sale of such merchandise.

Third. That said referee erred in his sixth finding of fact in that there is no evidence to show that at the time of the execution and delivery of said chattel mortgage and promissory note, it was understood by and between the Scandinavian American Bank, its officers, agents, and employees and said W. N. Russell, that the terms and conditions of said chattel mortgage were not to be carried out and were to be disregarded, broken and violated, and no

change was to be made in the manner in which said Russell was to carry on his business.

Fourth. That said referee erred in his seventh finding of fact in that there is no evidence to show that the provisions and agreements in the said chattel mortgage contained, authorizing said W. N. Russell to sell from the stock of goods, wares, and merchandise, covered by said chattel mortgage and from other goods, wares and merchandise of like kind thereafter added to, at retail to the regular and other customers of said W. N. Russell, for cash, or not to exceed thirty days credit to responsible parties was disregarded, broken and violated by said W. N. Russell, said bankrupt, in that credit was given by said W. N. Russell, said bankrupt, his agents, servants, and [34] employees, with the knowledge and consent of the said Scandinavian American Bank of Big Timber, its officers, agents, servants, and employees, to the regular and other customers of said W. N. Russell for a period greatly in excess of thirty days, and large amounts of goods, wares and merchandise were sold to the regular and other customers of said W. N. Russell by said W. N. Russell on credit for periods of sixty and ninety days, between June 29, 1915, and February 21st, 1916, and that said sales so made were made by and with the knowledge and consent of the said Scandinavian American Bank, its officers, agents, servants, and employees.

Fifth. That said referee erred in his eighth finding of fact in that there is no evidence to show that on February 21st, 1916, the date of the filing of the petition herein, and at the time said W. N. Russell

was adjudged bankrupt, there was due and owing from the said W. N. Russell's regular and other customers, the sum of One Thousand Six Hundred and Ninety-four and 95/100 Dollars (\$1694.95), for goods, wares and merchandise sold on credit and delivered by the said W. N. Russell between the 29th day of June, 1915, and the 21st day of February, 1916 A. D.

Sixth. That said referee erred in his ninth finding of fact in that there is no evidence to show that the provisions and agreements in the said chattel mortgage contained, requiring said W. N. Russell to keep an accurate account of all sales made either for cash, or on not to exceed thirty days' credit, and during the banking hours of each day to deposit the proceeds of such sales in the Scandinavian American Bank to the credit of the said Scandinavian American Bank to apply on the promissory note dated June 29th, 1915, after retaining sufficient of the proceeds of such sales to pay current bills and expenses of carrying on said business and for making change, were disregarded, broken and violated by said W. N. Russell, his agents, [35] servants and employees, and that the same were broken by and with the knowledge, consent and understanding of the said Scandinavian American Bank, its officers, agents and employees; and that said referee further erred in finding that there were sales and collections made between the 29th day of June, 1915, and the 21st day of February, 1916, the proceeds of which, after retaining in the office of said W. N. Russell sufficient of such proceeds to pay current bills and expenses

of carrying on the business of said W. N. Russell, were in excess of the sum of Five Thousand and No/100 Dollars (\$5,000), and were not during the banking hours of each day, or at all, or at any time deposited in the Scandinavian American Bank, or in any bank, to apply on said note; and that the proceeds of said sales and collections were deposited in said Scandinavian American Bank to the credit of said W. N. Russell, subject to his demand and check and that said proceeds were drawn out of said bank and used by said W. N. Russell, said bankrupt, and converted by him to his own use; and that a part thereof used by said W. N. Russell to pay creditors of the said W. N. Russell, who were creditors of the said bankrupt on the 29th day of June, 1915, and for a long time prior thereto, was converted by the said W. N. Russell to his own use, and that such conversion was by and with the knowledge and consent of the said Scandinavian American Bank, its agents, servants and employees.

Seventh. That said referee erred in his tenth finding of fact in that there is no evidence to show that the provisions and agreements in said chattel mortgage contained, requiring said W. N. Russell at least once a month, to wit, on or before the 10th day of each and every month during the continuance of said chattel mortgage, or any extension thereof, to account to said Scandinavian American Bank for all sales and collections made during the previous month and to pay over to [36] said Scandinavian American Bank at such times of accounting the proceeds of all such sales and collections to apply

toward the payment of the promissory note dated June 29th, 1915, given by said W. N. Russell to Scandinavian American Bank, after deducting the actual and necessary expenses of carrying on the business of said W. N. Russell as a lumber dealer and the other necessary living expenses of said W. N. Russell, and after deducting enough money to pay bills falling due for goods purchased to replenish said stock of goods, wares and merchandise, were broken, disregarded and violated by said W. N. Russell and the said Scandinavian American Bank; and that said bankrupt made no accounting to the said Scandinavian American Bank on the 10th day of each month between the 29th day of June, 1915, and the 21st day of February, 1916, or at all. That said referee erred further in finding that there was on the 10th day of each and every month between the 29th day of June, 1915, and the 21st day of February, 1916, money in the hands of the said W. N. Russell, the proceeds of sales and collections made by said Russell, in excess of money required for the necessary expenses of carrying on said business and for the living expenses of said Russell and in excess of money required to pay bills falling due for goods, wares and merchandise purchased to replenish the stock of goods, wares and merchandise; and that said money, the proceeds of sales and collections, were paid into the said Scandinavian American Bank to the credit of said Russell and were converted by him to his own use by payment to the creditors of the said W. N. Russell who were creditors of the said

bankrupt on June 29th, 1915, and for a long time prior thereto.

Eighth. That said referee erred in his eleventh finding of fact in that there is no evidence to show that the said Scandinavian American Bank did not demand an accounting on the 10th day of each month between the 29th day of [37] June, 1915, and the 21st day of February, 1916, or at all; and that the failure of the said Russell to account to said Scandinavian American Bank on the 10th day of each and every month between the 29th day of June, 1915, and the 21st day of February, 1916, was consented to and acquiesced in by the said Scandinavian American Bank, its officers, agents, servants and employees.

Ninth. That said referee erred in his twelfth finding of fact in that there is no evidence to show that between the twenty-ninth day of June, 1915, and the twenty-first day of February, 1916, there was at divers and sundry times and on the 10th day of each and every month a large sum of money in the possession of the said bankrupt Russell over and above the moneys required by said Russell to pay the necessary expenses of carrying on said business and the living expenses of said Russell, and the money required to pay bills falling due for goods, wares and merchandise purchased to replenish the stock of goods, wares and merchandise mortgaged to said bank; and that such money was the proceeds of sales and collections made from the regular and other customers of said Russell in the possession of said Russell, and deposited in the Scandinavian American

Bank to the credit of said Russell, which should and could have been applied toward the payment of said promissory note of June 29th, 1915, by said Russell, and that the same was applied toward the payment of said note, but was converted by said Russell to his own use through payment to divers and sundry persons who were creditors of said Russell on the 29th day of June, 1915, and for a long time prior thereto; and that said Scandinavian American Bank knew that said moneys were in the possession of said W. N. Russell at divers and sundry times and on the 10th day of each and every month between the 29th day of June, 1915, and the 21st day of February, 1916, and that said Scandinavian American Bank, its officers, agents, servants, and employees knew of and consented [38] to the conversion of said moneys by said W. N. Russell.

Tenth. That said referee erred in his thirteenth finding of fact in that there is no evidence to show that the provisions and agreements in the said chattel mortgage which granted permission to said W. N. Russell to purchase from time to time new goods, wares and merchandise for cash or its equivalent to replenish and keep up the stock of merchandise on hand at the time of the giving of the promissory note and chattel mortgage on the 29th day of June, 1915, were disregarded, broken, and violated; and that said Russell at divers and sundry times between the 29th day of June, 1915, and the 21st day of February, 1916, purchased goods, wares and merchandise in large quantities and in an amount exceeding the sum of Two Thousand Dollars (\$2,000) on credit and

did not pay cash therefor, or at all, and did not pay any sum or sums of money for said goods, wares and merchandise; and that said goods, wares and merchandise so bought on credit between the 29th day of June, 1915, and the 21st day of February, 1916, were received and taken into the warehouse and lumber yards of said W. N. Russell at Big Timber, Montana, and the same were used, and a part thereof sold in the ordinary course of business of said W. N. Russell between the 29th day of June, 1915, and the 21st day of February, 1916, and a portion thereof were in the Lumber yards and warehouse of said W. N. Russell, at Big Timber, Montana, on the 21st day of February, 1916; and that at the time of the adjudication herein, the goods, wares and merchandise so on hand unsold were taken possession of by the trustee herein; and that said purchases of goods, wares and merchandise on credit were made on credit by and with the knowledge, consent and understanding of the Scandinavian American Bank, its officers, agents, servants and employees.

Eleventh. That said referee erred in his seventeenth finding of fact in that there is no evidence to show that [39] the said John G. Ellingson, by virtue of his appointment as trustee herein, is entitled to the possession of the personal property described in the chattel mortgage dated June 29th, 1915, or of the proceeds thereof.

Twelfth. That said referee erred in his eighteenth finding of fact in that there is no evidence to show that all or any of the allegations contained in

the objections filed herein against the claim of the Scandinavian American Bank are true.

Thirteenth. That said referee erred in his first conclusion of law in that by reason of the facts and the law the chattel mortgage dated June 29th, 1915, and given by the said W. N. Russell to the Scandinavian American Bank is valid and of full force and effect as against the trustee herein and the creditors of the said W. N. Russell, bankrupt.

Fourteenth. That said referee erred in his third conclusion of law in that by reason of the facts and the law the claim of the Scandinavian American Bank should be allowed in the sum of Four Thousand Four Hundred and Fifteen and No/100 Dollars (\$4,415.00) as a preferred priority and secured claim by virtue of the chattel mortgage dated June 29th, 1915, and given by the said W. N. Russell to the aforesaid Scandinavian American Bank; and that by reason of the facts and the law the said Scandinavian American Bank should not be compelled to share pro rata with the other creditors of the said bankrupt in the assets of the estate of the said W. N. Russell, doing business under the name of W. N. Russell Lumber Co., and W. N. Russell as an individual, in the sum of One Thousand and Ninety-five and 95/100 Dollars (\$1,095.95).

WHEREFORE the Scandinavian American Bank of Big Timber prays that it may be decreed by the court to have its [40] claim against the said bankrupt estate allowed for the full amount thereof as a preferred priority and secured claim, and that it be restored to all things lost by reason of

the finding and order of the referee in said matter.

And your petitioner ever prays, etc.

THE SCANDINAVIAN BANK OF BIG
TIMBER.

By JAY LOVING,

Cashier.

CHAS. W. CAMPBELL,

MILLER & O'CONNOR,

Attorneys for the Petitioner.

United States of America,

District of Montana,

County of Sweetgrass,—ss.

I, Jay Loving, an officer of the Scandinavian American Bank of Big Timber, the petitioner herein, to wit: Its cashier, do hereby make a solemn oath that the statements in the foregoing petition are true according to the best of my knowledge, information and belief.

JAY LOVING,

Subscribed and sworn to before me this twenty-seventh day of December, 1916.

[Seal]

CHARLES W. CAMPBELL,

Notary Public for the State of Montana, Residing at Big Timber, Mont. My commission expires May 31, 1918. [41]

United States District Court, Montana.

W. N. RUSSELL,

Bankrupt.

Opinion of Bourquin, J.

The referee found that the chattel mortgage involved is invalid, because when entered into the par-

ties intended that in vital provisions it would be disregarded and it was. In the main the court perceives no reason to dissent, and so the referee's order is affirmed.

The mortgage on a stock in trade provided that the mortgagees could sell in usual course for cash or credit not exceeding 30 days, that he would keep accurate accounts of sales, that he could deduct from proceeds his living expenses, business, current expenses, and to replenish stock, deposit the net daily with and to the credit of the mortgagee bank for application to the discharge of the mortgage debt, and monthly account to the mortgagee for all sales and collections of the previous month, paying the net to the bank to apply to payment of the debt.

The mortgagee's cashier testified that the mortgagor had borrowed from the bank from time to time, that the bank "had quite a number of notes in the pouch * * * * past due, and knowing" his condition that he was owing quite a bit besides what he owed us," the bank procured the mortgage, "and told him, * * * * we would like to see him make out and we would be willing to carry him as long as he kept his stock up in shape and his business was done and that it was perfectly agreeable to us that he pay off the other creditors, as long as he did not run his stock down and took care of his business."

The mortgagor testified that on execution of the mortgage, he asked the mortgagee's cashier, who therein was acting for the bank, if he should keep a record and daily account of what I was [42]

doing and they said that would not be necessary, and I then asked them if I should come in the first of the month with statement of what I was doing "and they said no, that they would call for a statement when they wanted it."

The mortgagee deposited his receipts with the bank but in his own name, none of them were applied to the payment of the mortgagee debt. He checked them out as he pleased, in part to pay creditors prior to the mortgage and others not creditors of the business, he created new debts at the bank by overdraft and his deposits of business receipts were appropriated to their payment, he kept no accounts save sale slips, and rendered no monthly account to the bank.

The significance of all this is sought to be evaded by the mortgagee but unavailingly. The cashier attempts to modify his testimony, but it was apparent to the referee it was but an effort to relieve from the effect of his admissions on oath.

That at some indefinite time this mortgagor also deposited other money with his receipts from the mortgaged stock, cannot affect the situation.

The facts stand out that the parties intended the mortgage to protect them from interference by other creditors, to shield payments to such creditors as the mortgagee preferred and to keep by additions the stock for the protection of the mortgagee. All this operating to hinder and delay creditors after a fashion the law condemns as fraudulent, the mortgage is invalid.

This intent suffices to this conclusion. It tends to

defraud, and so the law stamps the mortgage as contrary to public policy, illegal and invalid, without inquiry whether or not fraud actually was committed.

But here, the intent was executed, and what *was* done serves to corroborate evidence of what was *intended* to be done. [43]

The evil may be illustrated thus:

The debtor owes as much or more than his business is worth.

He gives a mortgage to one creditor by the terms of which sales can be made from the proceeds of which the business is to be conducted and the net to be applied on the mortgage debt. To appease other prior creditors, the parties to the mortgage agree that so long as the stock is kept replenished the mortgagee may violate the terms of the mortgage and divert the net to pay prior creditors. He done so. The result may be that whereas if prior creditors had not been so appeased, they might have proceeded in bankruptcy and the mortgagee and they have received but a small percentage of their claims, by the method adopted the prior creditors could be paid in full, after four months the mortgage would be *prima facie* valid, and proof against attack in subsequent bankruptcy, the stock kept up by new purchases on credit pays the mortgagee in full, and the new creditors are defrauded. Defrauded in that they had a right to assume the mortgage terms were to be carried out, the net applied to extinguish the mortgage. That in due time it would be so extinguished and the stock available to pay their claims against the mort-

gagor, the law of this State will not permit.

See *Noyes vs. Ross*, 23 Montana, 425.

Nothing else seems to require notice, further than to say that failure for months to render the stipulated monthly accounts and failure to apply any of the proceeds to the mortgage debt would likewise invalidate the mortgage. Casual inquiries by the cashier of the bankrupt whether there was anything to report, how he was getting along, etc., is not a monthly account and does not serve the purposes of such a monthly account.

The deposits in seven months are over \$8,500. On occasion as much as \$400 were on deposit in the bank, to the mortgagor's credit.

The referee was not satisfied, none of this could be applied to this mortgage debt. And as in all else, his findings thereon having [44] support in the evidence and not palpably contrary to the weight of the evidence, are not to be disturbed. This order is affirmed.

BOURQUIN J. [45]

Service admitted and a copy acknowledged June 26th, 1917.

FRANK ARNOLD,
Attorney for Trustee. [46]

[Endorsed]: No. 3016. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of W. N. Russell, Bankrupt, The Scandinavian American Bank of Big Timber, Montana, a Corporation, Petitioner, vs. John G. Ellingson, Trustee for the Bankrupt, W. N. Russell, Doing

Business Under the Name of W. N. Russell Lumber Company, and W. N. Russell as an Individual, Respondent. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a certain order of the United States District Court for the District of Montana.

Filed July 3, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of W. N. RUSSELL, Bankrupt.

THE SCANDINAVIAN AMERICAN BANK
OF BIG TIMBER, MONTANA, a Corpora-
tion,

Petitioner,

vs.

JOHN G. ELLINGSON, Trustee for the Bankrupt,
W. N. RUSSELL, Doing Business Under the
Name of W. N. RUSSELL LUMBER COM-
PANY, and W. N. RUSSELL, as an In-
dividual,

Respondent.

**TRANSCRIPT OF RECORD IN SUPPORT OF
PETITION FOR REVISION**

Under Section 24b of the Bankruptcy Act of Congress, Approved
July 1, 1898, to Revise, in Matter of Law, a Certain Order
of the United States District Court for the
District of Montana.

*In the District Court for the United States, in and
for the District of Montana.*

BANKRUPTCY.

In the Matter of W. N. RUSSELL, Doing Business
Under the Name and Style of W. N. RUS-
SELL LUMBER COMPANY and W. N.
RUSSELL as an Individual.

At Livingston, Montana, in said District, on the
—— day of October, 1916, before E. M. Niles, one of
the referees in bankruptcy of said court, E. J. Moe,
W. N. Russell, J. G. Ellingson, Frank Arnold and
J. Loving, of the counties of Sweet Grass and Park,
State of Montana, being duly sworn and examined at
the time and place above mentioned, upon their
oathes testified as follows:

[a-1]

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Testimony of E. J. Moe, for Petitioner.

[a-2] Examination of witness, E. J. MOE, by Mr. J. F. O'CONNOR and Mr. CHARLES CAMPBELL, attorneys for the Bank.

Q. You may state your name and residence.

A. E. J. Moe, Big Timber, Montana.

Q. What official position do you hold, if any, in connection with the Scandinavian-American Bank of Big Timber, during the year 1915?

A. Was holding position of cashier.

Q. What is the nature of the institution known as the Scandinavian-American Bank of Big Timber?

A. It is a banking institution.

Q. Are you familiar with the organization of that bank? A. I am.

Q. Under the laws of what State was it organized?

A. Under the laws of the State of Montana.

Q. Has the Sandinavian-American Bank of Big Timber received authority from the State Bank Examiner of the State of Montana to do a banking business?

A. Received its charter to do a banking business in 1914.

Q. Where is the principal place of business of this bank?

A. On McLeod Street, Big Timber, Montana.

Q. When were you first connected with the Scandinavian-American Bank of Big Timber, and what position did you occupy?

A. From January 1st to May 14th, 1914, I was organizer of the institution, and on May 14th, we

(Testimony of E. J. Moe.)

opened the bank, but before opening for business we held our stockholders' meeting and I was elected cashier.

Q. How long did you hold the position of cashier?

A. Until January 1st. I am not positive but it was at our annual stockholders' meeting last January, I was elected vice-president. I think it was the first Tuesday in January.

[a-3] Who was your successor into the office of cashier of the bank? A. Jay Loving.

Q. Who is cashier of the Scandinavian-American Bank at this time? A. Jay Loving.

Q. Has he held that position continuously from the time he was elected until the present time?

A. He has held the position since our annual meeting in January last.

Q. Are you personally acquainted with W. N. Russell? A. I am.

Q. When did you first become acquainted with him?

A. The first time I knew Mr. Russell was in 1912, I believe, while I was in the Citizens State Bank.

Q. While you were cashier of the Scandinavian-American Bank did you, as an officer of that Bank, transact any business with W. N. Russell?

A. I did.

Q. When was the first business transacted with W. N. Russell?

A. I cannot say positively, but I think it was shortly after we opened up; that was in May, 1914; cannot say positively it was in May, but I know it was

(Testimony of E. J. Moe.)

not very long after we started doing business.

Q. Did the Scandinavian-American Bank, while you were occupying the position of Cashier, make any loans to W. N. Russell? A. We did.

Q. Are you familiar with the loan of \$4,165 that was made to W. N. Russell on the 29th day of June, 1915?

A. I am familiar with the loan at that time, but I think Mrs. Russell signed the note with him. I think her name is Chloe M. Russell.

[a-4] Q. In handing you the claim of the Scandinavian-American Bank of Big Timber, which was filed with E. M. Niles, Referee in the above matter, I will ask you if Exhibit C which is attached to that claim, is a true and correct copy of the original note that was given by W. N. Russell and Adella J. C. Russell to the Scandinavian-American Bank of Big Timber, on June 29, 1915? A. It is.

Q. What were the circumstances incident to the making of the loan?

A. Mr. Russell had borrowed money from us from time to time, and we had quite a number of notes in the pouch and practically all of them were past due, and knowing Mr. Russell's condition, that he was owing quite a bit besides what he owed us, we got Mr. Russell in there one day and took a note for the full amount of his indebtedness to us at that time, which was also secured in chattel and real estate mortgage, and told him that we would be willing to carry him for this money; that we would like to see him make out and we would be willing to carry him as long as he kept his stock up in shape and his business was

(Testimony of E. J. Moe.)

done, and that it was perfectly agreeable to us that he pay off the other creditors, as long as he did not run his stock down and took care of his business.

Q. At the time this note of \$4,165 was made to the Scandinavian-American Bank, was there any money advanced to W. N. Russell, in addition to the amount that he was already owing to the Bank?

A. There was.

Q. Do you know the amount that was advanced at that time?

A. I cannot say positively, but several hundred dollars. I think about every attorney in town was trying to jump on the man with bills and we tried to help him out in two or three cases.

[a-5] Was there any security given for the note of \$4,165? A. There was.

Q. What security was given?

A. Real estate mortgage on the lots and a chattel mortgage on the stock of lumber, lime, cement, coal, etc.

Q. Was the real estate mortgage on the lots and chattel mortgage on the stock in trade and merchandise? A. Yes.

Q. Do you know the description of those lots?

A. I don't know as I could give them offhand.

It is admitted that the certified copy of the chattel mortgage and the original real estate mortgage, attached to the proof of claim, should be admitted in evidence and the records show that the copy of the note of \$4,165 is admitted in evidence, without objection having been attached to the proof of claim, as a

(Testimony of E. J. Moe.)

true and correct copy of the original given to the Scandinavian-American Bank.

Q. How much did W. N. Russell and Adella J. C. Russell owe to the Scandinavian-American Bank at the time of the execution of the note of \$4,165, on the 29th day of June, 1915?

A. That was the total amount of his indebtedness, with the exception of the note of \$159, which he endorsed or signed with his brother.

Q. Will you state in figures, the amount of money that was owing to the Bank on the 29th day of June, 1915, by W. N. Russell. A. \$4,165 and interest.

Q. Has any amount ever been paid on that note?

A. There has not.

[a-6] Q. Has anything been paid by W. N. Russell or anyone in his behalf? A. There has not.

Q. Who is the owner and holder of that note for \$4,165 at the present time?

A. The Scandinavian-American Bank is the owner and holder of it.

Q. I will call your attention to Exhibit D attached to the claim of the Scandinavian-American Bank on file herein, and ask you if that is a true and correct copy of the note that was given to the Scandinavian-American Bank on the 30th day of June, 1915?

A. Yes, it is.

Q. What is the amount of that note?

A. \$125.

Q. Was the consideration for which that note was given advanced to W. N. Russell? A. It was.

Q. I will call your attention to Exhibit "E" at-

(Testimony of E. J. Moe.)

tached to the claim of the Scandinavian-American Bank on file herein, and ask you if that is a true and correct copy of a note that was given to the Scandinavian-American Bank by W. N. Russell and C. B. Russell on the 2d day of December, 1915?

A. It is.

Q. What is the amount of that note?

A. \$170.

Q. Was the consideration for which that note was given advanced and given to W. N. Russell?

A. It was given to W. N. Russell and C. B. Russell.

Q. I will call your attention to Exhibit "F" attached to the claim of the Scandinavian-American Bank, on file herein, and ask you if it is a true and correct copy of the note which [a-7] was given to the Scandinavian-American Bank of Big Timber on December 17, 1915?

A. It is.

Q. What is the amount of that note?

A. \$170.

Q. Was the consideration for which this note was given, advanced and turned over to W. N. Russell?

A. It was.

Q. Is W. N. Russell and Warren N. Russell one and the same person?

A. They are.

Q. I will ask you who is the owner and holder of the notes that I have just called your attention to, viz.: Exhibits "D," "E" and "F," attached to and made a part of the claim of the Scandinavian-American Bank herein?

A. The Scandinavian-American Bank is the owner

(Testimony of E. J. Moe.)

and is in possession of them.

Q. Has Mr. Russell paid any part of any one of these notes?

A. I think that he has. He of course paid the interest on the other notes that he had which he took up.

Q. Do the endorsements that were made on the back of any or all of these notes show the correct amount that was paid on them? A. They do.

I would like now to offer in evidence Exhibits "D," "E" and "F," which are attached to and made a part of the claim of the Scandinavian-American Bank, on file herein.

The Trustee and Objectors object to the reception in evidence of Exhibits "D," "E" and "F," part of the proof of claim herein, insofar as they are intended to be offered for the [a-8] purpose of proving additional advances under the provisions of the chattel mortgage, and particularly insofar as they are in excess of the sum of \$4,165, the amount of the principal note described in the chattel mortgage and interest up to the date of the filing of the claim. There is no objection to the notes or exhibits particularly mentioned being received in evidence insofar as they are assembled for the purpose of simply proving the claims of those notes as an ordinary credit.

Exhibits "D," "E" and "F" are admitted in evidence, subject, however, to the provisions and conditions of the mortgages given to secure the same.

Q. I will ask you what amount was secured by the real estate mortgage which was given as security for

(Testimony of E. J. Moe.)

the note of \$4,165? A. \$4,165.

Q. What amount of money was secured by the chattel mortgage which was given to secure the note of \$4,165?

A. \$4,165 and the advance of \$250.

Q. Was the amount of money equal to or in excess of \$250 given to W. N. Russell by way of future advances after the execution of the note of \$4,165?

A. There was some money advanced to Mr. Russell after the execution of the note of \$4,165 in excess of \$250.

Q. Was the real estate mortgage and the chattel mortgage, which were given to the Scandinavian-American Bank as security for the one note of \$4,165?

A. They were, and the chattel mortgage included \$250 additional.

[a-9] Cross-examination by Mr. ARNOLD, for the Trustee and objecting creditors.

Q. Mr. Moe, you were the cashier of the Scandinavian-American Bank from the time of its organization, or rather from the time it commenced to do business May 4, 1914, up to its annual meeting in January, 1916, when you were elected vice-president?

A. Yes.

Q. Now, during the time you were cashier of the bank you had active management and control of the officers of the Bank? A. I did.

Q. And all loans and credits were given by your authority and were under your jurisdiction?

A. No, sir.

(Testimony of E. J. Moe.)

Q. Who else made these loans and credits besides you?

A. On all loans, with the exception of very small loans, we have a Discount Committee, who has to be consulted on all loans.

Q. Were you a member of the committee?

A. I have been ever since the organization of the bank and am a member of it now.

Q. As a member of the Discount Committee and as the cashier of the bank, you passed on these loans to W. N. Russell? A. Yes, sir; I did.

Q. As cashier of the bank, Mr. Moe, you are familiar with the accounts of the customers of the bank, and particularly you would be familiar with the account of W. N. Russell?

A. Yes, I would be, up to the time that Mr. Loving went in as cashier, since which time I have not paid as close attention.

Q. But up to January, 1916, when you were promoted, you were familiar with the account of Russell? A. Yes, very.

[a-10] Q. And you were attentive to and kept close track of all that went through that account?

A. Pretty close.

Q. Now, the account of W. N. Russell Lumber Company and W. N. Russell was kept in one account at your bank?

A. W. N. Russell owned the company.

Q. Was it carried in the name of the company?

A. It was carried in three or four different ways.

Q. The account was kept in your books under one

(Testimony of E. J. Moe.)

heading? A. Yes, sir.

Q. Drawing your attention to the note of June 29, 1915, for \$4,165, marked Exhibit "A" and a part of the proof, was that transaction closed and completed with Mr. Russell by you?

A. It was closed and completed by Mr. Russell, myself, Mr. Loving and Mr. Franklin.

Q. When you speak of it being closed with those three, do you mean that those are the three persons who were there when the note was executed?

A. They were the three persons there at the time we agreed to let Mr. Russell have the money.

Q. When it came to the actual execution of the papers, who was it that completed that transaction?

A. Mr. Campbell and myself.

Q. Where were they executed?

A. The note was signed at the bank and it was taken to Mr. Campbell's office and he made the mortgage and signed before him.

Q. Who was it that agreed with Mr. Russell that this mortgage was to be given on behalf of the bank?

A. Mr. Franklin, Mr. Loving and myself.

Q. Were you three gentlemen what was known as the Discount Committee?

[a-11] A. No, we are not, but any three of the directors. Mr. Loving and Mr. Franklin were both directors of the bank at the time.

Q. Then I take it that pursuant to the agreement or demand of the three directors, including yourself, this chattel mortgage was made and executed?

A. The real estate and chattel mortgage.

(Testimony of E. J. Moe.)

Q. You stated on direct examination, Mr. Moe, that you had a number of notes in the pouch that were due and overdue? A. I did.

Q. This note of \$4,165 was given, was it not, to take up those notes?

A. Yes, it was taken in renewal and he got additional money at the time.

Q. Now, then, did the \$4,165 cover, at the time, the note was given, all of the indebtedness at that time?

A. All with the exception of the note that he had signed with his brother.

Q. Interest and everything? A. Yes, sir.

Q. And it covered an additional advance that was made to him at the time?

A. The additional advance was not made to him on that day.

Q. I thought I understood you to say that it was.

A. The chattel mortgage calls for the additional advance of \$250.

Q. I am not referring to that additional advance of \$250. I am referring to the additional advance necessary to make up the \$4,165 in addition to the notes that you had in the pouch which were due, with interest.

A. When Mr. Russell executed this note for \$4,165, it was to take up all outstanding indebtedness in the way of notes and everything he owed the Bank, including interest.

[a-12] Q. And there was an additional sum, as I understand it, that was given to him to make up the \$4,165.

(Testimony of E. J. Moe.)

A. It was given him to take up the indebtedness due the Bank at that time. I cannot say as to the advance at that time.

Q. What he owed the bank at that time, including interest, and this two or three hundred dollars, made up the total of \$4,165? A. Yes.

Q. Have you any means of definitely ascertaining or telling us now what that sum was that was given him to make up the \$4,165?

A. No, sir; I cannot tell now, but I can tell from our books.

Q. Have you got your books with you?

A. No, I have no books to show.

Q. Haven't you got Mr. Russell's ledger account with the Bank? A. Yes.

Q. Then you have it here, have you not?

A. Yes.

Q. Then I will ask Mr. Campbell to produce it. Now, I ask for the production of everything that you have at the present time, either in your custody or in Mr. Moe's custody, with reference to the account of the Russell Lumber Company and anything with reference to the giving of this \$4,165 note that will show how the amount was made up.

Q. Now then, Mr. Moe, what is that you have in your hand at the present time?

A. It is Mr. W. N. Russell's account with the Scandinavian American Bank, that is, the ledger sheets that are taken from our individual ledger that carries our customers' checking accounts.

Q. That will show the checking account of the

(Testimony of E. J. Moe.)

Russell or Lumber Company? A. Yes.

[a-13] Q. From what date, Mr. Moe?

A. These sheets are from the 7th day of May, 1915, down to the 7th day of October, 1916.

Q. And those sheets are a part of the records of your Bank? A. Yes.

Q. And these are the sheets that were kept in the bank in the regular course of business of the bank?

A. Yes.

Q. The amount that was given to Mr. Russell at the time of the execution of this mortgage and note of June 29th, 1915, over and above the amount of his then existing indebtedness to the bank, how was that given to Mr. Russell?

A. I think he was given credit for it to take care of the check that he had given for coal.

Q. And whatever item it was was placed to his credit on the ledger that you now have with you. Now, can you refer to that ledger under date of June 29th, 1915, and state what that amount was?

A. On June 29th, 1915, Mr. Russell got credited with a deposit of \$300 and a deposit of \$200.16. I cannot state which one of those it was he got additional, but I am inclined to believe it was the \$300.

Q. And that \$300 being placed to his account was used in the ordinary course of his business and to take care of a check that was outstanding, is that correct?

A. He used the money to pay other creditors.

Q. A creditor that was existing at the time that this loan was made? A. Yes.

(Testimony of E. J. Moe.)

Q. And that was done with your knowledge and your consent as an officer of the bank?

A. Yes.

[a-14] Q. Letting him have the money?

A. No, paid a portion of the money to the creditors then existing.

Q. Now then, you stated, Mr. Moe, in your direct examination that this transaction of the \$4,165 was made because you knew of his embarrassed condition at that time?

A. I do not think I made any such statement.

Q. Well, you stated, did you not, in substance, there were a number of notes in the pouch, and knowing of his condition, this transaction was completed. A. I do not think I did.

Q. You want it to be understood this time, that you did not, on direct examination by Mr. Campbell, when he asked you to relate the circumstances incident to making this loan, make the statement that you knew of his condition, or knowing of his condition, or words to that effect? A. I did not.

Q. At that time I think you stated that every attorney in Big Timber was jumping on him?

A. No, I did not say it at that time.

Q. Well, it was after that time, was it Mr. Moe, that every attorney in Big Timber was jumping on him? A. Yes, I think it was.

Q. That condition existed, did it Mr. Moe, during the period of time from June 29th, 1915, until January, February or March, 1916? After the big loan had been made, the longer it ran after that, the worse

(Testimony of E. J. Moe.)

it got and the more attorneys in Big Timber and Livingston were after Mr. Russell to obtain money?

A. Yes.

Q. You were aware of this as an officer of the Scandinavian American Bank? A. Yes.

[a-15] They came in and consulted you, did they not, as to how they could get money? A. Yes.

Q. Mr. Campbell was also trying to collect money from him, was he, during the period this chattel mortgage was given? A. Yes.

Q. Mr. Campbell was your attorney and a stockholder and a director of your bank? A. Yes.

Q. During the period following June 29th, 1915, and up to the present time? A. Yes.

Q. Now, Mr. Moe, you stated that the understanding was, when this chattel mortgage was given and this loan made, that Mr. Russell was to keep his stock in shape and keep it up and do business right?

A. We told him that was about as strong as we could possibly go with him, and he would have to try to conduct his business a little better and we would be glad to stay with him as long as he was attending to his business and taking care of his outstanding creditors and that we were willing to carry him.

Q. You mean the creditors that were in existence at the time this mortgage was given?

A. The creditors he had outside of the bank.

Q. Did you make any inquiry from him as to how much was owing at that time to his creditors outside of the bank?

A. I do not remember whether he made us a state-

(Testimony of E. J. Moe.)

ment at that time or not.

Q. Do you know whether you made any inquiry of him?

A. I think we did, we talked it over.

Q. And the understanding also was at that time that after the giving of the chattel mortgage, he was to keep his [a-16] stock up and not permit it to run down?

A. Naturally when a bank owns chattel property, they want a man to take care of it.

Q. You stated that he was to pay off his other creditors, which he testified to, that was to be done out of the proceeds of his sales of merchandise from time to time subsequent to the giving of that mortgage?

A. We told him to take care of his bills.

Q. But he was to take care of his bills to his creditors, was he not, out of his daily business?

A. Yes.

Q. And that was the only way he had of taking care of it out of his lumber business?

A. Yes, excepting a farm he owned.

Q. That was not to run his business, was it?

A. I think that ran part of his business.

Q. Drawing your attention to Exhibit "D," the note dated June 30th, 1915, for \$125, that would be the date of this chattel mortgage would it not?

A. I think so.

Q. Can you tell me from the ledger account of Mr. Russell whether that \$125 was placed to his credit?

(Testimony of E. J. Moe.)

A. There was a credit to his account on June 30, 1915, of \$125.

Q. Now then, drawing your attention to Exhibit "E," the note dated December 2d, 1915, for \$170.90, that was signed by W. N. and C. B. Russell?

A. Yes.

Q. On your direct examination, you stated that the money for that was given to W. N. and C. B. Russell? A. Yes.

Q. Do you remember the transaction?
[a-17] In the first place it was a note that his brother had at the Citizens' Bank, and we let him have the money and W. N. signed it with him, and it was renewed two or three different times.

Q. This was the last renewal of it? A. Yes.

Q. Then Mr. W. N. Russell, on December 2d, 1915, received no part of that \$170.90? A. No.

Q. And as far as you know, W. N. Russell received no part of it; it was an obligation of C. B.'s at the Citizens' State Bank?

A. I do not know which one of them received the benefit. They ran an account with us as W. N. & C. B. Russell, and I think they got credit for it at that time.

Q. No part of that has ever been paid to either W. N. or C. B. Russell? A. No.

Q. You do not claim that as one of the advances made under the provisions of the chattel mortgage, do you? A. I do not think so.

Q. Now, drawing your attention to Exhibit "F," the note dated December 17, 1915, for \$170, will you

(Testimony of E. J. Moe.)

refer to the ledger account of Mr. Russell and advise me whether that \$170.90 was placed to his credit with the bank?

A. On December 17, 1915, W. N. Russell received credit for \$170.90.

Q. The note, Exhibit "F," bears on the back of it, Mr. Moe, under date of January 7, 1916, an endorsement of \$50.00 on the principal. Can you tell me how that was paid?

A. I cannot tell by these sheets.

Q. What was the purpose, Mr. Moe, of making this note Exhibit "C" for \$4,165 a demand note?

[a-18] A. Well, a demand note is usually taken in the case of mercantile business.

Q. You want it to be understood, then, that the merchants who borrow from banks usually have to give demand paper?

A. The banks usually prefer it.

Q. What was the purpose of making the interest payable semi-annually with a demand note?

A. I think the note was made for a year, and at that rate of interest we insist on the interest being paid semi-annually. Unless we demand payment of principal, we demand interest, payable semi-annually.

Q. What was the purpose of putting the clause in there that interest should only be paid semi-annually? A. It is to be paid semi-annually.

Q. Did you or did you not deviate from the regular custom of the bank when you made the interest on this demand note payable semi-annually?

(Testimony of E. J. Moe.)

A. No, sir.

Q. Now, on January 7, 1916, when you made that endorsement of \$50 on this note, Exhibit "F," why was the endorsement made on the last note that was given instead of on the \$4,165 note?

A. Because I think that that note was taken for two weeks, or some such matter.

Q. The large note was even shorter than that, was it not?

A. It was a demand note. The large note was secured by a chattel mortgage. When a bank loans money, it is usually applied on the money that is advanced after the mortgage is taken.

Q. Now you stated, Mr. Moe, that you did not receive anything on this indebtedness at all, or the bank did not? A. Not on the \$4,165 note.

Q. You mean when you state that you did not receive anything [a-19] except the \$50 from W. N. Russell himself, you are of course not referring to anything that has been paid to your bank by the trustee in bankruptcy?

A. No, I am not considering that.

Q. Mr. Moe, have either you or Mr. Campbell in your possession here, or any of your attorneys, got any other papers that would show the account of W. N. Russell with Scandinavian American Bank except what you produced this morning?

A. I do not know whether Mr. Campbell has or not.

Q. Did you produce these accounts for Mr. Campbell yesterday?

(Testimony of E. J. Moe.)

A. Yes. He came in and called for them.

Q. Then I will ask Mr. Campbell; have you any other accounts with reference to the account of W. N. Russell in your possession?

A. All I think is the individual ledger sheets and a few cancelled checks that were not turned back to Mr. Russell.

Q. And the bank-book, have you got that?

A. No, I haven't it; he has that.

Direct Examination by Mr. CAMPBELL.

Q. I will ask you, Mr. Moe, was W. N. Russell insolvent at the time this mortgage of \$4,165 was made? A. Not to our knowledge.

Q. Did you make any investigation, or was any investigation made on behalf of the bank at that time, to determine the probable value of the stock on hand at the time the mortgage for \$4,165 was taken?

A. Yes.

Q. You may state in a brief way the nature of that investigation.

A. When Mr. Loving was down in the lumber yard, he checked over the yard. When he came back to the bank he reported to Mr. Franklin and myself.

[a-20] Q. What did the officials of the bank do?

A. The officials of the bank asked Mr. Loving for his report, and stated that we could take the loan.

Q. Was there any fire insurance on the stock and the buildings in the yard at the time this loan was taken?

A. There was \$5,200 insurance written on June 24th.

(Testimony of E. J. Moe.)

Q. Was there any further insurance placed on this property?

Objected to on the ground that it is incompetent, irrelevant and immaterial and not a proper method of estimating value.

Objection sustained.

Q. What representations, if any, did Mr. Russell make to you relative to his financial condition at the time that he negotiated this loan for \$4,165?

A. He represented to us that what he owed the bank was all he owed, with the exception of the additional amount we let him have at that time.

Q. Then, in other words, the additional amount over and above what he already owed to the bank at that time, would be sufficient to pay up all his outstanding indebtedness at that time?

Objected to on the ground that it is leading, calling for a conclusion of the witness, and is a matter for the court to pass on.

Objection sustained on the ground that it *leading* to the conclusion of the witness.

Cross-examination by Mr. ARNOLD.

Q. Now, you say, Mr. Moe, that Russell was not insolvent to your knowledge? A. No.

Q. Did you make any inquiry?

A. No, just what he told us. We certainly would not have loaned the money to him if we had known he was insolvent.

[a-21] Q. As a matter of fact, when you loaned him \$200 you were just securing yourself when you gave him this mortgage?

(Testimony of E. J. Moe.)

A. We had security before.

Q. What did you have before?

A. Chattel mortgages. I do not know their exact amounts.

Q. What did they cover?

A. Covered stock of lumber, coal, etc.

Q. Now you say there was \$5,200 insurance thereon. Do you know how that insurance was placed? A. Yes.

Q. Now, then, you state that at the time that you made this loan of \$4,165 and took the security and note, he told you that all that he owed was what he owed to the bank and that \$300 that you gave him additional on the 29th day of June, 1915?

A. Yes.

Q. When did he tell you that?

A. That day at the bank.

Q. Who to?

A. Mr. Loving, Mr. Franklin and myself.

Q. To what did you refer when you told him he was to take care of his creditors?

A. He would buy coal and let it run to the very last minute and then ask us for money to take care of it.

Q. Then you were not referring to any other creditors?

A. No. He owed \$300, which we advanced him at that time.

Q. When you said this morning that he was to take care of his other creditors, you meant creditors who were going to become creditors after this chat-

(Testimony of E. J. Moe.)

tel mortgage was given? A. Most certainly do.

Q. Not the creditors that were in existence prior to the giving and execution of this note and mortgage for \$4,165?

[a-22] A. The only creditor that he had at the time was?

Q. Have you read the chattel mortgage?

A. No, not recently.

Q. Did you read it at the time it was given?

A. Yes,

Q. You are familiar with its terms? A. Yes.

Q. You were then and are now an officer of the bank? A. Yes.

Q. I will draw your attention, Mr. Moe, to the chattel mortgage which is Exhibit "D" of the bank's proof of claim, and I will draw your attention to the clause in that chattel mortgage: "It is further agreed that the party of the first part may, from time to time, purchase new supplies of coal, lumber, cement, paints, oils and building material for cash or its equivalent to replenish and keep up said stock now on hand." You were familiar with that?

A. Yes.

Q. Now, then, Mr. Moe, providing that he was to pay cash or its equivalent for everything he purchased to keep up the stock in his yards, how did you expect him to have creditors that he was to take care of?

He surely would have creditors for a while.

A. Not if he owed nothing at all.

Q. If they shipped him a carload of coal, he neces-

(Testimony of E. J. Moe.)

sarily would have a creditor until he made payment.

A. Yes.

Q. Then your idea was Mr. Russell had a right to purchase merchandise to keep up the stock and obtain credit for a reasonable length of time under the chattel mortgage?

A. He necessarily would have to have a few days of credit [a-23] from the time the shipment was made to him.

Q. Before he got the merchandise?

A. I mean when they shipped the merchandise.

Q. Then you knew he was receiving merchandise to keep up the stock and he did not pay for it until after he got the merchandise and obtained credit for it? A. Coal is about the only thing he got.

Q. Did you not know, as a matter of fact, he bought and took lumber into his yard? A. No.

Q. Did you not make an examination of the lumber yard at the time this loan was made? A. No.

Q. Did you ever go near it afterwards?

A. Yes.

Q. Did you not see that there was lumber and other building materials added to the stock of merchandise? A. Yes.

Q. Now, then, as a matter of fact you expected him then to obtain credit for a period of time on each purchase that he made? A. Yes.

Q. Now, those are the only creditors who had to be taken care of?

A. What we wanted Russell to do was to pay for

(Testimony of E. J. Moe.)

the stuff he had got to replenish his stock; the stuff he would need.

Q. Did you ever make an investigation to see that he had? A. He reported to us that he had.

Q. Did you ever examine his books for that paper?
A. No.

Q. Did you ever have him give you a financial statement in writing? A. No. [a-24]

Q. Did you ever have him give you any statement on the 10th day of any month during this time the chattel mortgage was in force?

A. No, he did not in writing?

Direct Examination by Mr. ARNOLD.

Q. Mr. Russell, will you state your name?

A. W. N. Russell.

Q. You are the bankrupt in this case? A. Yes.

Q. You were doing business at Big Timber during the years 1914 and 1915? A. Yes.

Q. What name were you doing business under?

A. W. N. Russell Lumber Company.

Q. Not a co-partnership or anything, just you as the W. N. Russell Lumber Company?

A. The lumber business was done that way. I was doing other business.

Q. What business were you engaged in, Mr. Russell, at Big Timber? A. Lumber and coal.

Q. Cement, lime and such things?

A. All building materials.

Q. Now then, do you remember the time that you executed a chattel mortgage and a real estate mortgage to the Scandinavian American Bank at Big

(Testimony of E. J. Moe.)

Timber for \$4165, about June 29, 1915?

A. Yes, sir.

Q. That note and mortgages were executed at whose request?

A. At the request of the bank.

Q. Do you remember where it was executed?

[a-25] A. At Campbell's office.

Q. Do you know who was present at the time?

A. Yes, myself, my wife, Campbell, and Moe was there part of the time. It seems to me Loving was there for a while; cannot say he was there during the whole proceedings.

Q. Do you remember, Mr. Russell, what cash was given you at that time as part consideration for this mortgage?

A. No, not that I could say for sure.

Q. Have you any means of ascertaining just what that was?

A. Only by my pass-book and the two entries made in it on that day. I rather think it was \$300.

Q. And the balance of the \$4165 was made up of what, if you remember?

A. That was money I had received prior to this large note and was in the shape of other notes.

Q. Now, at the time that you gave this note to the Scandinavian American Bank and gave this security, were you indebted to any other person or persons?

A. Yes.

Q. Have you any idea for what amount at that time? A. About \$2,000.

(Testimony of E. J. Moe.)

Q. Who else did you owe, if you remember; did you owe any persons?

A. Yes. I cannot say who they were at that time.

Q. Now then, Mr. Russell, do you keep any books of accounts showing a list of your creditors?

A. No.

Q. Did you keep one at that time? A. No.

Q. What was your method of keeping your accounts of your creditors?

A. I filed the bills of lading of materials shipped.

[a-26] Q. How about the invoices?

A. That was practically the invoices with bills of lading. Those were the only accounts I kept.

Q. When you paid anything, state whether or not those invoices would be taken out of the bill file and put away as receipts? A. They were.

Q. Have you got any of those with you? A. No.

Q. What became of them?

A. They went with my books. The sheriff took them. He took the receipts.

Q. At the time that you executed this note and these two mortgages, the chattel and other mortgage, what if anything was said between you and Mr. Moe and whoever else was present, with reference to your other creditors that were in existence at that time?

A. Nothing whatever, as I remember. No talking over at all that I remember.

Q. Did you ever talk with Mr. Moe with reference to these creditors who were in existence at the time?

A. I did.

Q. Do you remember talking with him or any other

(Testimony of E. J. Moe.)

officer of the bank at the time this mortgage was executed? A. No.

Q. Did you talk with him afterwards, during the time the chattel mortgage was in existence?

A. Yes.

Q. About the creditors who were in existence before?

A. No. I asked for a letter from the Bank for creditors I talked to them about and about by coal that I had borrowed additional money for.

Q. You spoke to him from time to time about your creditors who [a-27] were asking and demanding money from you during the time the mortgage was in existence?

A. No. Not while this big mortgage was in existence.

Q. Did you ever discuss your creditors with him?

A. No.

Q. What was said at the time of the execution of this mortgage, either by Mr. Campbell or Mr. Moe, with reference to this chattel mortgage and what you were to do in connection with it?

A. They were both there when I asked if I should keep a record and daily account of what I was doing, and they said that would not be necessary, and I then asked them if I should come in the first of the month with statement of what I was doing, and they said no, that they would call for a statement when they wanted it.

Q. Did you ever, at any time, Mr. Russell, monthly between the tenth day of each and every month dur-

(Testimony of E. J. Moe.)

ing the life of this mortgage or any time, make any statement of your business dealings and your business as a lumber merchant to the Scandinavian American Bank in writing? A. No.

Q. Did you monthly make a verbal account to them of your receipts and disbursements and sales and collections made, giving them the figures at any time during the months this mortgage was in force?

A. No, not exactly a statement that way ever. Such things as they asked me about I told.

Q. Did they ever ask you what your sales had been for any particular month? How much paid out and collected and did you tell them? A. Yes.

Q. Where did you get the figures from?

A. My check-book always showed what I was paying out.

[a-28] Q. Now, then, did you keep any other books except your check-book as to what you were paying out? A. No.

Q. Did you at any time keep any book or other account of your daily receipts and sales?

A. No.

Q. Had you any means of ascertaining from books the amount of your sales during any particular month? A. No.

Q. What books of account did you keep?

A. The McClaskey System.

Q. And that McClaskey System is what? How is it kept?

A. It is in the order of a file. Each party gets a

(Testimony of E. J. Moe.)

space in that. A duplicate copy of the sale made them is kept in those files.

Q. In other words, Mr. Russell, if you sell John Jones a bill of goods, you make a bill out for it in duplicate. You give John Jones the duplicate and you put the original in the McClaskey File or books, under his particular name? A. Yes.

Q. And if John Jones buys any additional merchandise, you make a new bill or invoice of that and carry forward the old balance? A. Yes.

Q. And the system shows after each transaction what balance is due from any particular individual?

A. Yes.

Q. That is the correct system? A. Yes.

Q. That is the only thing that you did in the way of keeping accounts of the sales made to your different customers? A. Yes.

[a-29] Q. And the only accounts you did keep?

A. Yes.

Q. Now then, when you say that you made statements to Mr. Moe whenever they asked you as to your business, these statements, were they made at any particular time? A. No.

Q. They were not made in writing? A. No.

Q. How did you get your figures, Mr. Russell, showing your sales made each day? How would you get those to give Mr. Moe?

A. From my McClaskey and check-book.

Q. Did you make it out and take it to Mr. Moe or did you just guess at the figures?

(Testimony of E. J. Moe.)

A. No, I was never asked to give them an accurate account in dollars and cents.

Q. And you never did give them an accurate account either in writing or otherwise? A. No.

Q. You kept your bank account where?

A. With the Scandinavian American Bank.

Q. Subsequent to the 29th day of June, 1915.

A. Yes.

Q. In whose name did you keep it?

A. W. N. Russell.

Q. Did you keep an account in the Scandinavian American Bank in any other person's name?

A. No.

Q. When you made your deposits in the bank, did you at any time subsequent to the 29th day of June, 1915, deposit money in the Scandinavian American Bank or any other bank to the credit of the Scandinavian American Bank? A. No.

[a-30] Q. The proceeds and the receipts of your business from sales and moneys collected after deducting the necessary expense of carrying on your business and for the payment of current bills, where were they deposited, Mr. Russell?

A. In the Scandinavian American Bank.

Q. To whose credit? A. W. N. Russell.

Q. All of this money that was deposited in the Scandinavian American Bank to the credit of W. N. Russell, who was it checked out by?

A. W. N. Russell.

Q. On checks signed by whom?

A. W. N. Russell.

(Testimony of E. J. Moe.)

Q. By anybody else? A. No.

Q. After these amounts that were deposited in the Scandinavian American Bank to your credit subsequent to the giving of this chattel mortgage on the 29th day of June, 1915, were any of the moneys deposited applied on the payment of this \$4165 note?

A. No.

Q. Or to any other note that you gave to the bank that was covered by this mortgage? A. No.

Q. Now, at the time, Mr. Russell, that you made any statement or statements to Mr. Moe or the officers of the Scandinavian American Bank, whoever they were, did you or did you not, at such times, have an adjustment or make a balance and pay over to them any balance that there might be due to them out of your sales and collections? A. No.

Q. And there were moneys on hand at the times that you discussed these statements with them?

[a-31] A. Yes.

Q. Now, Mr. Russell, did you, during the time that this mortgage was in force, subsequent to June 29th, 1915, and that time you went out of business, sell goods and merchandise consisting of lumber, cement and other materials to your regular and other customers? A. Yes.

Q. State whether or not there are some of the customers to whom you made sales subsequent to June 29th, 1915, that had not, up to the time that you went out of business, pay you for what they purchased from you? A. Yes.

Q. State whether or not, subsequent to the giving

(Testimony of E. J. Moe.)

of that chattel mortgage, you made any purchases of lumber or other materials to keep up your stock in the lumber-yard?

A. Yes.

Q. State whether or not, at all times, you paid cash or its equivalent, for the lumber or other materials so purchased? A. No.

Q. State whether or not, at the time you went out of business, some of these purchases that had been made, were not then paid for? A. Yes.

Q. Is this what is called the McClaskey system, Mr. Russell? A. Part of it.

Q. And this is the McClaskey system that was used by you? A. Part of it.

Q. The other part would be where?

A. At Big Timber.

Q. The part that is in Big Timber, would it have any of the accounts in it? A. I think not.

[a-33] Q. This part we have here then is what would contain the accounts of your debtors or any other customers at the time you went out of business?

A. Yes.

Q. Insofar as they were not paid? A. Yes.

Q. Those were turned over to the Sheriff, were they not, and as far as you know whose possession are they found in now?

A. The Sheriff's, as far as I know.

Q. Whose possession did you see them in last?

A. In the hands of the Trustee.

Q. Mr. Russell, state whether or not you made sales and collections daily during the time you were

(Testimony of E. J. Moe.)

in business, subsequent to June 29h, 1915, until petition was filed? A. I did.

Q. I draw your attention to objector's exhibit 1 and ask you what that is, Mr. Russell?

A. A check for \$262 given to G. B. Selter.

Q. What is the notation on the bottom of that, Mr. Russell?

A. On Western Lumber Company's note.

Q. Mr. J. B. Selter is what?

A. This check was given to Mr. Selter, lawyer, at Big Timber.

Q. And that was to apply on Western Lumber Company's account? A. Yes.

Q. State whether or not at the date that that check was given, it was given for the account that was owing prior to that date by you? A. It was.

Q. State whether or not that check was paid?

A. It was.

Q. State whether or not, Mr. Russell, that check was given to Mr. Selter before or after the execution of this chattel [a-34] mortgage and note on the 29th day of June, 1915.

A. It was after.

Exhibit 1 admitted in evidence.

Q. I draw your attention to Objector's Exhibit 2, and will ask you what that is?

A. Check C. W. Russell for \$60.

Q. What was that \$60 for?

A. A loan that I made at that time.

Q. I will ask you whether or not that check was made through the Scandinavian American Bank and

(Testimony of E. J. Moe.)

your account charged with it? A. It was.

Q. Who is Mr. C. W. Russell? A. A cousin.

Objection to introduction of Exhibit 2 on account of the fact that it has no connection with the business.

Q. You kept no cash book? A. No.

Q. The only account that you kept of your cash was on the stubs of your check-book? A. Yes.

Q. State whether or not that show your daily receipts or whether any book showed your daily receipts? A. No.

Q. What did the stubs of your check-book show?

A. Showed what each check was written for.

Q. State whether or not your deposits you made in the Bank as shown by the stubs of your check-book were the proceeds of your sales and collections subsequent to June 29, 1915, in your business?

A. No.

Q. Those deposits that you made in the Bank, as shown [a-35] by that stub, where did you get the money from then?

A. Some of this came from the ranch and some from other work outside of the yard.

Q. What other work? A. Team work.

Q. Can you tell how much teaming you were doing? A. No.

Q. Can you tell how much you got from the ranch?

A. No. All went in together.

Q. Then there was other money went into the Scandinavian American Bank other than the proceeds of the sales of your business? A. Yes.

[Testimony of E. J. Moe.]

Q. You have no idea how much?

A. No, I haven't.

Q. Now then, at the time this check of \$80 was given to your cousin, what did you have in the bank according to the stub of your check-book?

A. It shows a balance of \$74.46.

Q. Prior to the giving of the \$80 check, what was the balance? A. \$124.46.

Q. On the 30th day of June, 1915, the day you drew that check for your cousin, did you make a deposit?

A. Yes.

Q. Of how much? A. \$125.

Q. I will ask you whether or not, Mr. Russell, the \$125 deposit that you made on June 30, 1915, was the \$125 that you borrowed from the bank on June 30th, 1915, as shown by Exhibit "D," represented by a note signed by you on that date?

A. I think it was.

[4-36] Q. From your books will you state what that \$80 was paid out of?

A. From the stubs it shows it was paid from that loan and the \$9.46 balance that was in the bank.

Q. I will draw your attention to Exhibit 43 and ask you what that is, Mr. Russell?

A. Check for \$124.71 given to the Scandinavian American Bank.

Q. Will you turn to the stub?

A. Interest on notes.

Q. Have you any independent recollection of what interest that paid?

A. That must have paid on the notes that were

(Testimony of E. J. Moe.)

due and owing before the mortgage was drawn up, because after that I do not see where there could be any interest like that due on any notes. It must have been the interest on them was settled the day after the mortgage was drawn up.

Q. State whether or not that was paid out of moneys that were in the bank on June 30, 1915, deposited by you?

A. There was not enough in the bank at that time to pay it. It must have been put in and turned out the same day.

Q. State, Mr. Russell, when you gave that check for \$124.71 on June 30, 1915, whether there was, according to that stub, enough money to take care of it? A. The balance on June 30th was \$74.46.

Q. When, if at all, did you make a deposit sufficient to cover the difference between the \$74.46 and this check for \$124.71, dated June 30?

Objected to. Overruled.

(Stipulation signed by the attorneys and filed herein.)

[a-37] STIPULATION.

IT IS STIPULATED AND AGREED by and between the parties hereto that the following accounts, aggregating the sum of One Thousand Six Hundred Ninety-four and 95/100 Dollars (\$1,694.-95) are the accounts of merchandise sold in the general course of business, at retail, by W. N. Russell, in his business as a lumber dealer at Big Timber, Montana, subsequent to the 29th day of June, 1915, and prior to the time of the filing of the peti-

tion herein. That the persons to whom said merchandise was sold were the regular and other customers of said W. N. Russell and that at the time of the filing of the petition herein, said accounts and each of them were unpaid and owing to said W. N. Russell by said customers and persons named, and that said merchandise, so sold to said customers and persons, was out of the stock of goods, wares and merchandise covered by the provisions of the chattel mortgage of June 29th, 1915, given by said Russell to the Scandinavian American Bank, and also out of the merchandise thereof added to the original stock of merchandise of said W. N. Russell and purchased by said Russell to replenish and keep up the stock of merchandise in his lumber yard subsequent to the 29th day of June, 1915.

Testimony of W. N. Russell, in His Own Behalf.

W. N. RUSSELL, called as a witness in the above-entitled matter, having been first duly sworn, upon examination testified as follows.

Examination by Mr. ARNOLD.

Q. Drawing your attention, Mr. Russell, to "Exhibit No. 4," I will ask you what it is.

A. That exhibit is a check drawn for \$50 in favor of John Ellingson, life insurance.

Q. That was for life insurance, was it?

A. Yes, sir.

Q. And state whether or not that was an indebted-

(Testimony of W. N. Russell.)

ness incurred before you gave this chattel mortgage?

A. It was taken out before this.

Q. State whether or not this was a payment—

A. (Interrupting.) Yes, sir.

Q. —of the premium of insurance and an indebtedness due prior to the giving of this chattel mortgage?

A. Yes, sir.

Q. Mr. Ellingson is engaged in what business?

A. He is engaged in the insurance business.

Q. State where he lives?

A. At Big Timber, Montana.

Q. Do you remember whether or not you talked to Mr. Moe, or any officer of the bank with reference to the payment of this? A. No, sir.

Q. State whether or not that check was paid and your account charged with the amount of it? [1]

A. It was.

Mr. ARNOLD.—I offer this check, "Exhibit No. 4," in evidence.

Mr. CAMPBELL.—We make the same objection to the introduction of this that we did to the other one.

The COURT.—The objection will be overruled.

Whereupon "Exhibit No. 4," was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 0257, Big Timber, Mont. July 3d, 1915. Pay to the order of John Ellingson, \$50.00. Fifty and no/100 Dollars. W. N. Russell. To Scandinavian America Bank, Big Timber, Montana.

(Back) John G. Ellingson.

(Testimony of W. N. Russell.)

Q. Drawing your attention to "Exhibit No. 5," I will ask you what that is, Mr. Russell.

A. "Exhibit 5" is a check for \$100 in favor of the Montana Sash and Door Company.

Q. Now, I will ask you whether or not, Mr. Russell, that check for \$100 was given for a debt that was due prior to the giving of the chattel mortgage of June 29, 1915?

A. It was on an open account.

Q. On an open account, was that open account an indebtedness that was due prior to the giving of the mortgage on June 29, 1915?

A. No, that was paid when this indebtedness fell due.

Q. Well, but state whether or not it was a payment [2] for merchandise that was bought and in your—that was bought prior to June 29, 1915.

A. I cannot say whether it was or was not. I was buying from those people each week, you might say. And paying them every 30 days.

Q. During the life of this chattel mortgage?

A. Yes, sir. And before the mortgage.

Q. Drawing your attention to check dated July 3, 1915, payable to the Citizens State Bank—can you state what that was for, Mr. Russell?

A. For advertising.

Q. Drawing your attention to Exhibit No. 6, I will ask you what that is, Mr. Russell.

A. That is a check for \$100.

Q. And payable to whom?

A. Payable to Fletcher & Evans.

(Testimony of W. N. Russell.)

Q. And that check was given to Fletcher & Evans for what purpose, or for whom?

A. Payment of account for Lindstrom Handforth Lumber Co.

Q. And Lindstrom Handforth were who?

A. The Lindstrom Handforth Lumber Company.

Q. Of where?

A. Tacoma, Washington; I believe.

Q. State, if you know, who Fletcher & Evans were? A. Attorneys.

Q. Attorneys. State whether or not this account of the Lindstrom Handforth Lumber Company was in their hands for collection? A. It was. [3]

Q. Now, I draw your attention, Mr. Russell, to the remark on the bottom of the check, what remarks are those?

A. It is written on the check, check given for "On Lindstrom Handforth Bill."

Q. State whether or not that writing you have just read, those words you just read were on the check at the time it was sent to Fletcher & Evans?

A. They were.

Q. And at the time it was paid by the Scandinavian American Bank? A. They were.

Q. Now, state whether or not that hundred dollars was for merchandise purchased and in your yards prior to the 29th day of June, 1915, when this chattel mortgage was given—this check is dated July 6, 1915. A. I think it was.

Q. Did you have any talk with Mr. Moe with reference to the payment of this check at all?

(Testimony of W. N. Russell.)

A. None.

Mr. ARNOLD.—I offer this check in evidence, which is “Exhibit No. 6.”

Mr. CAMPBELL.—We offer the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court an exception was duly taken.

Whereupon “Exhibit No. 6” was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Company, No. \$0265. Big [4] Timber, Mont., July 6th, 1915. Pay to the order of Fletcher & Evans, \$100.00. One hundred and no/100 Dollars. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. (Note) On Linstrom Hanforth Bill.

(Back) Fletcher & Evans, by R. E. Evans.

Lindstrom Handforth Lumber Co., T. J. Handforth, Treasurer. (And several clearing house stamps.)

Mr. ARNOLD.—Q. I'd like to ask you whether that one hundred dollars was paid by the Scandinavian American Bank and charged to your account?

A. It was.

Q. Now, drawing your attention to “Exhibit No. 7,” Mr. Russell, I will ask you to state what that is.

A. That is a check for \$60 to C. W. Russell.

Q. Can you tell what that was for, Mr. Russell?

A. I loaned him that.

Q. State whether or not the amount of this check was charged to your account and paid by the Scandinavian American Bank. A. It was.

(Testimony of W. N. Russell.)

Q. Where does C. W. Russell live?

A. His home is in—

Q. Where was he living at the time this check was given? A. He was returning to—

Q. State what relative he is to you, if any?

A. He is a cousin.

Q. Do you know whether or not he was acquainted with Mr. Moe? [5]

A. He had met Mr. Moe.

Mr. ARNOLD.—That check is offered in evidence, which is "Exhibit No. 7."

Mr. CAMPBELL.—We object to it on the same ground as heretofore indicated.

The COURT.—The objection will be overruled.

To which ruling of the Court an exception was duly taken.

Whereupon "Exhibit No. 7," was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 0267. Big Timber, Mont. July 7th, 1915. Pay to the order of C. W. Russell \$60.00. Sixty and no/100 Dollars. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. (Back) C. W. Russell, Tom kue.

Q. Drawing your attention to "Exhibit No. 8," I will ask you what that is, Mr. Russell.

A. That is a check for \$50.

Q. Payable to whom?

A. Bellingham National Bank.

Q. And what, if you know, was that paid for?

A. That is on notes for lumber.

Q. To whom?

(Testimony of W. N. Russell.)

A. I do not just recall whose lumber that one did pay.

Q. State whether or not it was for lumber that was bought before the 29th of June, 1915, and in your yard? A. Yes, I think it was.

I offer this check, "Exhibit No. 8," in evidence.
[6]

Mr. CAMPBELL.—It is objected to on the same ground as heretofore indicated.

The COURT.—The objection will be overruled.

To which ruling of the Court an exception was duly reserved.

Whereupon "Exhibit No. 8" was received in evidence and is in the words and figures as follows:

W. N. Russell Lumber Co. No. 0268. Big Timber, Mont. July 9th, 1915. Pay to the order of Bellingham National Bank, \$50.00. Fifty and no/100 Dollars. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. (Back) Several *clearing*-house stamps.

Q. Now, drawing your attention to Exhibit No. 9, I will ask you what that is, Mr. Russell.

A. That is a check for \$10 in favor of C. W. Allen, Secretary.

Q. There is an endorsement on that, or notation on that, what notation is that? A. "Chautauqua."

Q. Was that notation on there at the time the check was given? A. Yes, sir.

Q. I will ask you what that word "chautauqua" meant?

(Testimony of W. N. Russell.)

A. That was a bunch of players giving a show in town.

Q. And state what the purpose of this \$10 was?

A. It was for the purpose of bringing them there.

Q. Was it a contribution to this chautauqua? [7]

A. Yes, sir.

Q. State whether or not that check was paid through the bank and the amount of it charged to your account.

A. It was; yes, sir.

Mr. ARNOLD.—I offer this check, "Exhibit No. 9," in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court an exception was duly reserved.

Whereupon Exhibit No. 9 was received in evidence and is in the words and figures to wit:

W. N. Russell Lumber Co. No. —, Big Timber, Mont., July 5, 1915. Pay to the order of C. W. Allen, Sec. \$10.00. Ten and no/100 Dollars. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. (Back) C. W. Allen, Treas. and clearing-house stamp.

Q. Drawing your attention, now, to "Exhibit No. 10," I will ask you what that is.

A. That is a check for \$50.

Q. Payable to whom? A. J. B. Selters.

Q. And will you refer to the stub of your check book and say what that was for?

A. On northwestern lumber.

Q. State whether or not that was an account tha

(Testimony of W. N. Russell.)

was owing for merchandise purchased prior to June 29, the date of the chattel mortgage? [8]

A. It was.

Q. And who is Mr. Selters?

A. He is an attorney.

Q. And where? A. At Big Timber.

Mr. ARNOLD.—I offer exhibit No. 10 in evidence.

Mr. CAMPBELL.—We object to it for the same reason, and we make the additional objection, if the Court please, because there is no showing concerning any of these checks introduced this morning to the effect that they were payable out of funds derived from the proceeds of the sale of any merchandise which is the subject of the controversy.

The COURT.—The objection will be overruled.

To which ruling of the Court an exception was duly reserved.

Whereupon "Exhibit No. 10" was received in evidence and is in words and figures as follows, to wit: W. N. Russell Lumber Co. No. 0273. Big Timber, Mont., July 14, 1915. Pay to the order of J. B. Selters, \$50.00. Fifty and no/100 Dollars. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. (Back) J. B. Selters.

Q. Drawing your attention to "Exhibit No. 11," I will ask you what that is, Mr. Russell.

A. That is a check for \$50 drawn in favor of the Eureka Lumber Company.

Q. What's the notation at the bottom of the check? A. On account. [9]

(Testimony of W. N. Russell.)

Q. State whether or not that \$50 was for merchandise purchased prior to the giving of the chattel mortgage? A. It was.

Q. Was that check paid to the Scandinavian American Bank and the amount of it charged to your account? A. Yes, sir.

Mr. ARNOLD.—I offer "Exhibit No. 11" in evidence.

Mr. CAMPBELL.—We make the same objection, and in addition we object to it on the ground that it is shown that it was given for the purpose contemplated in the mortgage.

The COURT.—The objection will be overruled. To which ruling of the Court an exception was duly reserved.

Whereupon "Exhibit No. 11" was received in evidence and is in words and figures as follows, to wit:

W. N. Russell Lumber Co. No. 0274. Big Timber, Mont. July 20, 1915. Pay to the order of Eureka Lumber Co. \$50.00 Fifty and no/100 Dollars. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. On account. (Back) (Endorsed by) Eureka Lumber Company, C. A. Weil, President, and several clearing-house stamps.

Q. Drawing your attention to "Exhibit No. 12," I will ask you what that is.

A. That is a check for \$50, J. B. Selters.

Q. Will you turn to the stub of your check-book and state to the Court the purpose of that check?

(Testimony of W. N. Russell.)

A. It was given to the Western Lumber Co. notes.

Q. State whether or not those notes were for merchandise purchased prior to the giving of the chattel mortgage? A. I think it was.

Q. Was that sum of money charged to your account and paid on that check, in the Scandinavian American Bank? A. It was.

Mr. ARNOLD.—I offer "Exhibit No. 12" in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court an exception was duly reserved.

Whereupon "Exhibit No. 12" was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 0278. Big Timber, Mont. July 21, 1915. Pay to the order of J. B. Selters, \$50.00. Fifty and no/100 Dollars. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. (Back) J. B. Selters.

Q. Now, drawing your attention to "Exhibit No. 13," what is that?

A. That is a check for \$58.55.

Q. Payable to whom?

A. Payable to the Eureka Lumber Company.

Q. What is the notation on the bottom of the check, Mr. Russell? A. On account.

Q. State whether or not that check was for merchandise [11] that was purchased by you prior to June 29, 1915, and was in your lumber yard before that chattel mortgage was given? A. It was.

(Testimony of W. N. Russell.)

Q. State whether that, the amount of that check \$48.55, was charged to your account and paid thru the Scandinavian American Bank? A. It was.

Mr. ARNOLD.—I offer “Exhibit No. 13” in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court an exception was duly reserved.

Whereupon “Exhibit No. 13” was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 0280, Big Timber, Mont. July 30, 1915. Pay to the order of Eureka Lbr. Co. \$48.55, Forty-eight and 55/100 Dollars. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. (Back) Eureka Lumber Company, C. A. Weil, President. (And several clearing-house stamps.)

Q. Drawing your attention to “Exhibit No. 14,” I will ask you what that is, Mr. Russell?

A. That is a check for \$25 drawn in favor of J. B. Selters.

Q. Will you refer to the stub of your check book and tell the Court what that \$25 was given for?

A. It was given on note, Western Lumber Company.

Q. Was the note of the Western Lumber Company an [12] indebtedness contracted for merchandise prior to the giving of the chattel mortgage on June 29, 1915? A. It was.

Q. The merchandise was then in your yard at the

(Testimony of W. N. Russell.)

time of the giving of the chattel mortgage?

A. Yes, sir.

Mr. ARNOLD.—I offer “Exhibit No. 14” in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection *was* be overruled.

To which ruling of the Court an exception was duly reserved.

Whereupon “Exhibit No. 14” was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 0283, Big Timber, Mont. July 26th, 1915. Pay to the order of J. B. Selters, \$25.00, Twenty-Five and no/100 Dollars. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. (Back) J. B. Selters.

Q. Drawing your attention to exhibit 15, what is that, Mr. Russell?

A. That is a check for \$25 drawn in favor of J. B. Selters.

Q. Will you turn to the stub of your check book and say what that was given for?

A. On the Western Montana Lumber Co. note.

Q. Was that check, the amount of that check, charged to your account and paid through the Scandinavian American Bank? A. It was. [13]

Q. State whether or not the payment was on notes given for merchandise purchased prior to the giving of the chattel mortgaged, and which merchandise was in your yards at the time of the giving of the chattel mortgage. A. It was.

(Testimony of W. N. Russell.)

Mr. ARNOLD.—I offer “Exhibit No. 15” in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court, the bank, through its counsel, then and there duly excepted.

Whereupon “Exhibit No. 15 was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 0289, Big Timber, Mont. Aug. 3d, 1915. J. B. Selters, \$25.00. Twenty-five and no/100 Dollars To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. (Back) J. B. Selters.

Q. Drawing your attention to “Exhibit No. 16,” I will ask you what that is, Mr. Russell.

A. That is a check for \$50.00.

Q. And payable to whom?

A. Payable to the Bellingham Nat'l Bank.

Q. What is the notation on the bottom of the check?

A. On note Northwestern Lumber and Shingle Co.

Q. Was that notation on the bottom of the check made at the time of the making of the check?

A. It was.

Q. State whether or not the notation was on the check before it was paid by the Scandinavian American [14] Bank? A. It was.

Q. The Northwestern Lumber and Shingle Company notes, were they or were they not given for an indebtedness contracted prior to the giving of this chattel mortgage on June 29?

(Testimony of W. N. Russell.)

A. I think they were.

Q. State whether or not the merchandise that was represented by those notes was in the yard or had been received in the yard prior to the giving of this chattel mortgage? A. I think so.

Mr. ARNOLD.—I offer in evidence “Exhibit 16.”

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

Whereupon “Exhibit No. 16” was received in evidence and is in words and figures as follows.

W. N. Russell Lumber Co. No. 0299. Big Timber, Mont. Aug. 6th, 1915. Pay to the order of Bellingham National Bank, \$50.00, Fifty and no/100 Dollars. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. On notes to Northwestern Lbr. & Shingle Company. (Back) Bellingham National Bank, F. F. Handschy, Cashier. And other clearing house stamps.

Q. Drawing your attention to “Exhibit 17,” I will ask you to state what that is, Mr. Russell.

A. That is a check for \$50 drawn in favor of [15] Fletcher & Evans.

Q. What is the notation on the bottom of the check?

A. On Lindstrom Handforth account.

Q. State whether or not that notation was made at the time the check was drawn? A. It was.

Q. Who are Lindstrom and Handforth people?

(Testimony of W. N. Russell.)

A. Collectors—Lindstrom & Handforth? Lumber dealers.

Q. And why was this check made payable to Fletcher and Evans?

A. They were collecting the account.

Q. Who are Fletcher and Evans?

A. Attorneys.

Q. State whether or not the account that was then owing to the Lindstrom and Handforth company was for merchandise purchased prior to June 29, 1915, and for merchandise that had been received by you prior to then? A. I think it was.

Mr. ARNOLD.—I offer "Exhibit No. 17" in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court an exception was duly reserved.

Whereupon "Exhibit No. 17" was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 0300. Big Timber, Mont., Aug. 6th. 1915. Pay to the order of Fletcher [16] and Evans, \$50.00 Fifty and no/100 Dollars. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. On Lindstrom Handforth account.

(Back) Fletcher & Evans, by R. E. Evans. And numerous clearing house stamps.

Q. Drawing your attention to Exhibit No. 18, I will ask you what that is, Mr. Russell.

(Testimony of W. N. Russell.)

A. That is a check for \$25 drawn in favor of Joe Meister.

Q. What is the notation on the bottom of check?

A. Final payment on note given for mare.

Q. State whether or not that endorsement or notation on the bottom was made at the time that the check was given? A. It was.

Q. To whom, by whom? A. Myself.

Q. State whether or not that indebtedness to Joe Meister was existing at the time the chattel mortgage was given? A. It was.

Mr. ARNOLD.—I offer "Exhibit No. 18" in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court an exception was duly reserved.

Whereupon "Exhibit No. 18" was received in evidence, in words and figures as follows:

W. N. Russell Lumber Co. No. 0303. Big Timber, Montana. Aug. 12, 1915. Pay to the order of Joe [17] Meister, \$25.00 Twenty five and no/100 Dollars. To Scandinavian American Bank. Big Timber, Mont., W. N. Russell. Final payment on note given for mare. (Back) Joseph Meister. Also couple of clearing house stamps.

Q. Drawing your attention to "Exhibit No. 19," I will ask you what that is, Mr. Russell.

A. That is a check for \$25 drawn in favor of J. B. Selters.

Q. Will you turn to the stub of your check book

(Testimony of W. N. Russell.)

and state what that was given for?

A. On note Western Lumber Company.

Q. State whether or not that check was paid by the Scandinavian American Bank and charged to your account? A. It was.

Q. State whether or not the indebtedness was contracted prior to the giving of the chattel mortgage for merchandise that was purchased by you and received into your yard prior to the giving of the chattel mortgage?

A. It was.

Q. Now, I want to refer to "Exhibits 16, 17 and 18" for just a moment. Will you state whether those checks were paid through the Scandinavian American bank and charged to your account?

A. They were.

Mr. ARNOLD.—I offer "Exhibit No. 19" in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.
[18]

To which ruling of the Court an exception was duly reserved.

Whereupon "Exhibit No. 19" was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 0305, Big Timber, Montana, Aug. 16th, 1915. Pay to the order of J. B. Selters, \$25.00, Twenty-five and no/100 Dollars. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. (Back) J. B. Selters.

Q. Drawing your attention now to "Exhibit 20,"

(Testimony of W. N. Russell.)

I will ask you what that is.

A. That is a check for \$16.00 to J. B. Selters.

Q. That was given for what?

A. For note, Western Lumber Company.

Q. State whether or not that was made, or the amount called for by that check was paid through the Scandinavian American Bank and charged to your account? A. It was.

Q. State whether or not it was paid for merchandise purchased prior to the giving of the chattel mortgage which had been received by you prior to the giving of it? A. It was.

Mr. ARNOLD.—I offer "Exhibit 20" in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The exception will be overruled.

To which ruling of the Court an exception was duly reserved.

Whereupon "Exhibit 20" was received in evidence and [19] is in the words and figures as follows:

W. N. Russell Lumber Co. No. 0341. Big Timber, Mont. Oct. 5th, 1915. Pay to the order of J. B. Selters, \$16.00. Sixteen and no/100 Dollars. To Scandinavian-American Bank, Big Timber, Mont. W. N. Russell. (Back) J. B. Selters.

Q. Did you use an auto in connection with your business, Mr. Russell? A. I did.

Q. Drawing your attention to "Exhibit 21," I will ask you what that is.

A. That is a check for \$55 drawn in favor of H. Uttermohle.

Q. What is the notation on the bottom of that?

(Testimony of W. N. Russell.)

A. One-half payment and interest on lots 11 and 12.

Q. State whether or not that wasthe amount called for by that check was paid through the Scandinavian-American Bank and charged to your account.

A. It was.

Q. State when those lots were purchased from Mr. Uttermohle—prior to the giving of this chattel mortgage? A. They were.

Q. Was that notation on the check there at the time it was made out? A. It was.

Mr. ARNOLD.—I offer “Exhibit No. 21” in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.
[20]

To which ruling of the Court, an exception was duly reserved.

Whereupon “Exhibit No. 21” was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 0346. Big Timber, Montana, October 5th, 1915. Pay to the order of H. Utermohle, \$55.00. Fifty-five and no/100 Dollars. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. One half payment and interest on lots 11 and 12. (Back) H. Utermohle.

Q. Drawing your attention to “Exhibit No. 22,” I will ask you what that is.

A. That is a check drawn in favor of the M. C. Cormick Lumber Co. for \$32.50.

Q. What is the notation on the bottom of that

(Testimony of W. N. Russell.)

check, Mr. Russell? A. On account.

Q. State whether that notation was made on that check at the time it was drawn?

A. It was.

Q. State whether or not that notation was made before it was sent or given to the McCormick Lumber Company. A. It was.

Q. State whether or not the money was paid for merchandise purchased and received by you in your lumber business prior to June 29, 1915?

A. It was.

Q. State whether or not the amount called for by that check was paid through the Scandinavian [21] American Bank and charged to your account?

A. It was.

Mr. ARNOLD.—I offer in evidence “Exhibit No. 22.”

Mr. CAMPBELL.—We make the same objection. The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

Whereupon “Exhibit No. 22” was received in evidence and is in the words and figures as follows:

W. N. Russell Lumber Co. No. 0353. Big Timber, Mont., Oct. 9th, 1915, McCormick Lumber Co., pay to the order of, \$32.50, Thirty-two and 50/100 Dollars. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. On Account. (Back) Pay The Centralia State Bank, Centralia, Wash., or Order McCormick Lumber Co. And other clearing-house stamps.

(Testimony of W. N. Russell.)

Q. Drawing your attention to Exhibit No. 23, I will ask you what that is?

A. That is a check for \$25 drawn in favor of the Bellingham National Bank.

Q. Will you state what the notation on the bottom of the check is?

A. On notes, Northwestern Lumber and Shingle Co.

Q. Was that notation placed on the bottom of the check at the time it was made and prior to the time it was sent to the Bellingham Nat'l Bank?

A. It was.

Q. State whether or not this money was paid on notes that were given for merchandise purchased [22] by you prior to the 29th day of June, 1915, and received in your lumber yard prior to that time.

A. It was.

Mr. ARNOLD.—I offer "Exhibit No. 23" in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

Whereupon "Exhibit No. 23" was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 0355. Big Timber, Mont., Oct. 9th, 1915. Pay to the order of Bellingham National Bank, \$25.00. Twenty Five and no/100 Dollars. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. On notes of N. W. Lbr. & Shg. Co. (Back) Bellingham National

(Testimony of W. N. Russell.)

Bank, F. F. Handschy, Cashier. And other clearing house stamps.

Q. Drawing your attention to "Exhibit No. 24," I will ask you to state what that is.

A. That is a check for \$50 drawn in favor of H. Utermohle.

Q. What is the notation on the bottom of that?

A. Balance on lots 11 and 12, block 16.

Q. State whether or not lots 11 and 12 were purchased by you prior to June 29, 1915?

A. They were.

Q. State when the notation at the bottom of the *which*, to which you have just referred, was placed on the check? [23]

A. When it was written.

Q. Prior to the time the check was delivered to Mr. Utermohle? A. Yes, sir.

Q. State whether or not that check, "Exhibit 24," and "Exhibit No. 23" were both paid through the Scandinavian American Bank and the amount of the checks charged to your account? A. They were.

Mr. ARNOLD.—I offer "Exhibit No. 24" in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

Whereupon "Exhibit No. 24" was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 0359. Big Timber, Mont., Oct. 15th, 1915. H. Utermohle, pay to

(Testimony of W. N. Russell.)

the order of, \$50.00. Fifty and no/100, Dollars. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. Bal. on lots 11 and 12, block 16. (Back) H. Utermohle.

Q. Drawing your attention to "Exhibit No. 25," I ask you what that is, Mr. Russell.

A. A check for \$52.49 drawn in favor of the Scandinavian American Bank.

Q. Will you refer to the stub of your check-book and say what that was?

A. On note against automobile.

Q. On a note against an automobile? [24]

A. Yes, sir.

Q. What do you mean by note against automobile, Mr. Russell?

A. A loan or note with the machine securing it.

Q. And the note payable to whom?

A. To the Scandinavian American Bank.

Q. Have you got that note with you?

A. No, sir.

Q. Do you know where it is? A. No, sir.

Q. That note was given for what?

A. Why, security on the money I borrowed.

Q. Money you borrowed from whom?

A. From the Scandinavian American Bank.

Q. Was the note that was paid by this check, \$52.49, was that one of the notes that was covered by this chattel mortgage? A. No, sir.

Q. State whether that note was given to the Scandinavian American Bank prior to the 29th day of June, 1915, when this chattel mortgage was given?

(Testimony of W. N. Russell.)

A. No, sir. It was given afterwards, I think.

Q. Have you any means of telling?

A. No. Only by looking up the note.

Q. You haven't got the note? A. No, sir.

Q. You don't know where it is. Do you remember the amount of the note?

A. No, not exactly. I think it was—seems as it was a hundred dollars; but I'm not sure about it.
[25]

Q. State whether or not you remember whether this was the final payment on the note.

A. I do not know that.

Q. I will ask you whether Exhibit No. 25, a check for \$52.49, was paid through the Scandinavian American Bank, and the amount of it charged to your account. A. It was.

Mr. ARNOLD.—I offer "Exhibit No. 25" in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

Whereupon "Exhibit No. 25" was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 0383. Big Timber, Mont. Nov. 6th, 1915. Pay to the order of Scandinavian American Bank, \$52.49, Fifty-two and 49/100 Dollars. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell.

Q. Drawing your attention to "Exhibit No. 26," I will ask you what that is.

(Testimony of W. N. Russell.)

A. That is a check for \$40 in favor of A. L. Powell.

Q. What is the notation on the bottom of that check?

A. To apply on note.

Q. Who was A. L. Powell?

A. He was an insurance agent.

Q. Do you know when that note was given?

A. No, I don't. [26]

Q. Was it before or after June 29, 1915, if you remember, Mr. Russell? A. I don't remember.

Q. Was that notation on that check placed there at the time you made out the check and gave it to Mr. Powell? A. It was.

Mr. ARNOLD.—I offer in evidence "Exhibit No. 26."

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

Mr. ARNOLD.—We do not include in the offer the receipt, just the check.

Whereupon "Exhibit No. 26" was received in evidence and is in the words and figures as follows:

W. N. Russell Lumber Co. No. 0390. Big Timber, Mont. Nov. 21st, 1915. Pay to the order of A. L. Powell, \$40.00. Forty and no/100 Dollars. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. To apply on note. Back—A. L. Powell.

Q. Drawing your attention to "Exhibit No. 27," I will ask you what that is.

(Testimony of W. N. Russell.)

A. That is a check for \$20 drawn in favor of Frank Lamp.

Q. Will you refer to the stub of your check-book and say what that was given for, if you know?

A. Payment on paint.

Q. To Frank Lamp? A. Yes, sir. [27]

Q. You say payment on paint—to whom?

A. Why, it doesn't show here except Frank Lamp.

Q. Who is Mr. Frank Lamp?

A. An attorney in Big Timber, Montana.

Q. Can you tell from the stub of the check-book what company that money called for by the check was payable to? A. No, sir; I cannot.

Q. What was the purpose of paying this to Mr. Lamp?

A. He was collecting for two paint companies.

Q. State whether or not that payment was made for merchandise received by you in your business prior to June 29, 1915? A. It was.

Q. And it was owned at the time of the giving of the chattel mortgage, was it? A. Yes, sir.

Q. Was that \$20 called for by that check paid through the Scandinavian American bank and charged to your account? A. It was.

Mr. ARNOLD.—I offer in evidence Exhibit No. 27.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

Whereupon "Exhibit No. 27" was received in evidence and is in words and figures as follows:

(Testimony of W. N. Russell.)

W. N. Russell Lumber Co. No. 400. Big Timber, [28] Mont. Nov. 22, 1915. Pay to the order of Frank Lamp, \$20.00. Pay \$20 and 00 cts. Dollars. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. (Back) Frank Lamp.

Q. Drawing your attention to "Exhibit No. 28," I will ask you what that is?

A. That is a check for \$50 drawn in favor of J. B. Selters.

Q. And what is the notation on the bottom of it?

A. On account of Eureka Lumber Co.

Q. Who is the Eureka Lumber Co.?

A. Why, they're a lumber Company.

Q. Of where? A. Eureka, Montana.

Q. State whether or not this payment to Mr. Selters was on account of merchandise purchased from the Eureka Lumber Company prior to the giving of the chattel mortgage?

A. I don't know about that, whether it was before or after. It seemed like it was after.

Q. That notation was on the check, was it, Mr. Russell, at the time the check was given to Mr. Selters? A. It was.

Q. State whether or not the amount called for by that check was paid through the bank. A. It was.

Q. And charged to your account? A. It was.

Q. Now, drawing your attention to Exhibit No. [29] 29, I will ask you what that is.

A. That is a check for \$20 drawn in favor of Frank Lamp.

Q. Can you tell from the stub of your check-book

(Testimony of W. N. Russell.)

what it was for? A. It was on paint account.

Q. What account, do you know? A. No, sir.

Q. State how you happened to make this payment to Mr. Lamp?

A. He was collecting for two paint companies.

Q. State whether or not it was for paint that was received in your business prior to June 29, 1915?

A. It was.

Q. Was the amount called for by that check paid through the Scandinavian American Bank and charged to your account? A. It was.

Mr. ARNOLD.—I offer in evidence “Exhibit No. 29.”

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

Whereupon “Exhibit No. 29” was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 416. Big Timber, Montana, Dec. 4, 1915. Pay to the order of Frank Lamp, \$20.00 Pay \$20 and 00 cts. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. [30]

(Back) F. M. Lamp.

Q. Drawing your attention to “Exhibit No. 30,” I ask you what that is, Mr. Russell.

A. That is a check for \$32.10 drawn in favor of Roe James Glass Company.

Q. State what the notation is on the bottom of the check. A. Balance in full for plate-glass.

(Testimony of W. N. Russell.)

Q. State whether that notation was on the check at the time it was given to the Roe James Glass Company. A. It was.

Q. State whether or not that was given for merchandise purchased and received by you prior to June 29, 1915. A. Purchased after the mortgage.

Q. Purchased after the mortgage? A. Yes, sir.

Q. State whether or not the purchase of glass was paid for at the time you received it, in full?

A. No; thirty days. After I received it.

Q. State, if you can, after looking at the notation on the check, whether it was paid for in more than one payment? A. It was.

Q. Have you any means of ascertaining now just how much glass was purchased?

A. If we could find the freight bills, J. Loving could show the other payment on the glass. It was bought at the delivered price. [31]

Mr. ARNOLD.—I offer in evidence “Exhibit No. 30.”

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

Whereupon “Exhibit No. 30” was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 420. Big Timber, Mont. Dec. 4, 1915. Roe-James Glass Company, \$32.10. Pay \$32 and 10 cts. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. Bal. in full for plate-glass. (Back) Roe-James

(Testimony of W. N. Russell.)

Glass Co., Inc., and other counting-house stamps.

I'd like to ask you whether the amount called for by that check was paid through the Scandinavian American Bank. A. It was.

Q. And charged to your account? A. It was.

Q. Now, directing your attention to "Exhibit No. 31," I will ask you what that is, Mr. Russell.

A. A check for \$15 on the Oliver Typewriter Co.

Q. What is the notation on the bottom of it?

A. Balance in full for the machine.

Q. State if you can when, or about, the machine was purchased—prior to the giving of the chattel mortgage or after? A. I think after.

Q. State whether or not this was the final payment on the machine? [32]

A. It was. It says so.

Q. Was the amount called for by that check paid through the Scandinavian American Bank and charged to your account? A. It was.

Mr. ARNOLD.—I offer "Exhibit No. 31" in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

Whereupon "Exhibit No. 31" was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. N. 422. Big Timber, Mont. Dec. 4, 1915. Pay to the order of The Oliver Typewriter Co. \$15.00. Pay \$15 and 00 cts. To Scandinavian American Bank, Big Timber, Mont.

(Testimony of W. N. Russell.)

W. N. Russell. Bal. in full for machine. (Back) Pay to the order of any bank, banker or trust Co. Prior endorsements guaranteed. Dec. 15, 1915, Commercial Bank & Trust Company, 93-98, Big Timber, Mont. Other clearing-house stamps with a "cancelled" stamp over them.

Q. I'd like to ask you if that notation on the check, balance in full for machine, was on the check at the time that it was given? A. It was.

Q. And before payment? A. Yes.

Q. Now, directing your attention to "Exhibit No. 32," I will ask you what that is. [33]

A. That is a check for \$39.85 drawn in favor of the A. W. Miles Lumber Company.

Q. What is the notation on the bottom of the check? A. Part payment on cement.

Q. State whether or not that notation was on the check prior to the giving of it,—to the A. W. Miles Co.—I mean the words, "Part payment on cement"—was that on it before you gave the check to the lumber company? A. It was.

Q. State whether or not that cent was purchased before or after the giving of the chattel mortgage.

A. It was purchased afterwards.

Q. Do you know how long after the purchase of the cement and its receipt by you, this check was given? A. I think likely thirty days.

Q. Was the amount called for by the check paid by the Scandinavian American Bank and charged to your account? A. It was.

(Testimony of W. N. Russell.)

Mr. ARNOLD.—I offer in evidence “Exhibit No. 32.”

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

Whereupon “Exhibit No. 32” was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 427. Big Timber, Mont. Dec. 4, 1915. Pay to the order of A. W. Miles [34] Lumber Co. \$39.85. Pay \$39 and 85 cts. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. Part payment on cement. (Back) The A. W. Miles Lumber & Coal Co. Other clearing-house stamp.

Q. Drawing your attention to “Exhibit No. 33,” I will ask you what that is.

A. That is a check for \$65 drawn in favor of W. N. Russell.

Q. W. N. Russell was who? A. Myself.

Q. State whether or not you received the money called for by that check from the Scandinavian American Bank? A. I did.

Q. Was the amount called for by that check charged to your account? A. It was.

Mr. ARNOLD.—I offer in evidence “Exhibit No. 33.”

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

(Testimony of W. N. Russell.)

Whereupon "Exhibit No. 33" was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 431. Big Timber, Mont. Dec. 14, 1915. Pay to the order of W. N. Russell, \$65.00. Sixty-five and no/100 Dollars. To Scandinavian American Bank. W. N. Russell. [35]

Q. Drawing your attention to "Exhibit No. 34," I will ask you what that is.

A. That is a check for \$25 drawn in favor of the A. W. Miles Lumber Co.

Q. What is the notation on the bottom of the check? A. On account.

Q. Was that notation on the check at the time it was given to the A. W. Miles Co., before payment?

A. It was.

Q. State whether or not the amount called for by that check was paid through the Scandinavian American Bank and charged to your account.

A. It was.

Mr. ARNOLD.—I offer in evidence "Exhibit No. 34."

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

Whereupon "Exhibit No. 34" was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 442. Big Timber, Mont. Jan. 5th, 1916. Pay to the order of A. W. Miles Lumber Co. \$25.00. Twenty-five and no/100 Dollars. To Scandinavian American Bank, Big

(Testimony of W. N. Russell.)

Timber, Mont. W. N. Russell. On account.
(Back) The A. W. Miles Lumber & Coal Co. Other
clearing-house stamp.

Q. Drawing your attention to "Exhibit 35," I
ask you what that is, Mr. Russell?

A. That is a check for \$25 drawn in favor of the
A. W. [36] Miles Co.

Q. What is the notation on that check?

A. Balance of account in full.

Q. State whether or not that notation was on it
at the time the check was given? A. It was.

Q. And before it was paid? A. It was.

Q. And was the amount called for by that check
paid through the Scandinavian American Bank and
charged to your account? A. It was.

Mr. ARNOLD.—I offer in evidence "Exhibit No.
35."

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection is overruled.

To which ruling of the Court, an exception was
duly reserved.

Whereupon "Exhibit No. 35" was received in evi-
dence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 450. Big Timber,
Mont. Jan. 10th, 1916. Pay to the order of A. W.
Miles Lumber Co. \$25.00. Twenty-five and no/100
Dollars. To Scandinavian American Bank, Big
Timber, Mont. W. N. Russell. Bal. of account in
full. (Back) The A. W. Miles Lumber & Coal Co.

Q. Drawing your attention to "Exhibit No. 36,"
I will ask you what that is, Mr. Russell.

(Testimony of W. N. Russell.)

A. That is a check for \$21.60 drawn in favor of J. B. Selters.

Q. What is the notation on that check? [37]

A. On Eureka account.

Q. What is the meaning of the notation "On Eureka account?"

Mr. CAMPBELL.—That is objected to for the reason that the check is the best evidence.

Q. Who are the Eureka people?

A. They were a lumber concern.

Q. State how you happened to make this check payable to J. B. Selters?

A. He was collecting for the company.

Q. State whether or not the account of the Eureka Lumber Co. was for merchandise purchased prior to the giving of the chattel mortgage and merchandise that was received by you prior?

A. I think it was.

Mr. ARNOLD.—I offer "Exhibit No. 36" in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection is overruled.

To which ruling of the Court, an exception was duly reserved.

Whereupon "Exhibit No. 36" was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 453. Big Timber, Mont. Jan. 13th, 1916. Pay to the order of J. B. Selters, \$21.60. Twenty-one and 60/100 Dollars. To Scandinavian American Bank, Big Timber, Mont.

(Testimony of W. N. Russell.)

W. N. Russell. "On Eureka Account." (Back)

J. B. Selters.

Q. Drawing your attention, now, to "Exhibit No. 37," I will ask you what that is, Mr. Russell. [38]

A. That is a check for 55 cents.

Q. Payable to whom? A. I cannot read that.

Q. Well, but you can tell us what the check was, what does the check say? A. 55 cents, it says.

Q. And payable to whom? A. I don't know.

Q. Well, what is that word there? (Indicating.)

A. I just told you I didn't know; what more do you want.

Q. What is the notation on the bottom of it?

A. Interest on note.

Q. Do you know anything about it?

A. No, I do not recall.

Q. Do you know why it was given? A. No, sir.

Q. If that is a check to your account, do you know why—

A. It's interest on that note as near as I can see.

Q. Well, what note is that, do you know?

A. No, sir.

Q. Now, drawing your attention to "Exhibit No. 38," I will ask you what that is, Mr. Russell.

A. A check for \$1.81 to the bank.

Q. Payable to what bank?

A. To the Scandinavian American Bank.

Q. Who drew that check? A. Myself.

Q. When? [39] A. It was October 7th.

Q. Of what year? A. 1916.

Q. Now, what was the purpose of that check?

(Testimony of W. N. Russell.)

A. Payment on deposit box.

Q. Have you got a deposit box at the Scandinavian American Bank? A. Not now. I did have.

Q. When did you give that box up?

A. From the time the box—

Q. (Interrupting.) No, when did you discontinue having it? A. It run for a year and a quarter.

Q. Do you know when the quarter expired?

A. No, I don't.

Q. Was the amount called for by this check charged to your account? A. It was.

Q. And paid through the Scandinavian American Bank? A. It was.

Q. Well, now, was that money put into the bank subsequent to your being adjudicated a bankrupt or was it money that was in the bank at the time you were adjudicated a bankrupt?

A. Why, I think afterwards.

Q. You put this in afterwards? A. It was.

Q. Have you got an account with the bank now?

A. No, sir.

Mr. CAMPBELL.—That is objected to as immaterial, [40] and if the Court please, I move to strike the answer out as not having anything to do with the case.

The COURT.—Strike it out as being immaterial.

To which ruling of the Court, an exception was duly reserved.

Q. Now, Mr. Russell, drawing your attention to "Exhibit No. 39," I will ask you what that is.

A. That is a check for \$6.45 drawn in favor of

(Testimony of W. N. Russell.)

the City Meat Market.

Q. State whether or not that was—state, if you know, what that check was for? A. Meat.

Q. For your personal expenses and household use?

A. Yes, sir.

Q. Was that paid through the Scandinavian American Bank and charged to your account?

A. It was.

Mr. ARNOLD.—I offer “Exhibit No. 39” in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—What is the purpose of it?

Mr. ARNOLD.—The idea is this: The chattel mortgage provides that he was to keep sufficient money on hand to pay his living expenses and deposit the balance in the bank. Now, then, this shows he did not do any such a thing, whatever he got he put it into the bank and took it out and used it in any way he wanted in contravention of his agreement with the bank. [41]

The COURT.—Admitted; I cannot see how it will be detrimental to the interests of the bankrupt.

Mr. ARNOLD.—Possibly may not make any difference whether he did it one way or the other, but it shows how he was handling that account.

Mr. CAMPBELL.—He had a right to live out of the proceeds of the business.

Mr. ARNOLD.—Not after he put the money in the bank.

Mr. CAMPBELL.—Don't make any difference whether he checked it out or whether he used cash.

(Testimony of W. N. Russell.)

The COURT.—It will be admitted.

Whereupon “Exhibit No. 39” was received in evidence, having been objected to and an exception taken to the ruling of the Court, and is in words and figures as follows:

W. N. Russell Lumber Co. No. 0256.

Big Timber, Mont., July 1st, 1915. Pay to the order of City Meat Market, \$6.45. Six and 45/100 Dollars. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. (Back) City Meat Market. Goering Bros.

Q. Now, drawing your attention to “Exhibit 41,” I will ask you what that is.

A. A check for \$2.90 favor of City Meat Market.

Q. And the purpose of that is what?

A. To pay for living expenses.

Q. Your personal living expenses? A. Yes, sir.
[42]

Q. That check was paid, was it, through the Scandinavian American Bank and charged to your account? A. It was.

Mr. ARNOLD.—I offer “Exhibit 41” in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court an exception was duly reserved.

Whereupon “Exhibit No. 41” was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co., No. 0295. Big Timber, Mont., Aug 4, 1915. Pay to the *lrder* of City Meat Market, \$2.90. Two and 90/100 Dollars. To Scan-

(Testimony of W. N. Russell.)

Scandinavian American Bank, Big Timber, Mont.. W. N. Russell. (Back) City Meat Market, Goering Bros.

Q. Drawing your attention to Exhibit No. 42, I will ask you what that is, Mr. Russell.

A. That is a check for \$11.17 drawn in favor of the City Meat Market.

Q. Payable for what? A. Living expenses.

Q. State whether or not the amount called for by that check was paid through the Scandinavian American Bank. A. It was.

Q. And charged to your account? A. It was.

Mr. ARNOLD.—I offer in evidence "Exhibit 42."

Mr. CAMPBELL.—We make the same objection.

[43]

The COURT.—The objection will be overruled.

To which ruling of the Court an exception was duly reserved.

Whereupon "Exhibit No. 42" was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 0342. Big Timber, Mont., Oct. 5th, 1915. Pay to the order of City Meat Market, \$11.17. Eleven and 17/100 Dollars. To Scandinavian American Bank, Big Timber, Mont.. W. N. Russell. (Back) City Meat Market, Goering Bros.

Q. Drawing your attention to "Exhibit 43," I will ask you what that is, Mr. Russell.

A. A check for \$3.80.

Q. Payable to whom?

A. The City Meat Market.

(Testimony of W. N. Russell.)

Q. And that was for what?

A. That was for living expenses.

Q. Personal expenses? A. Yes, sir.

Q. Was the amount called for by that check paid through the Scandinavian American Bank and charged to your account? A. It was.

Mr. ARNOLD.—I offer in evidence "Exhibit 43."

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court an exception was duly reserved.

Whereupon "Exhibit No. 43" was received in evidence [44] and is in words and figures as follows:

W. N. Russell Lumber Co. No. 377. Big Timber, Mont., Nov. 2d, 1915. Pay to the order of City Meat Market, \$3.80. Three and 80/100 Dollars. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. (Back) City Meat Market, Goering Bros.

Q. Drawing your attention to "Exhibit No. 44," I will ask you to state what that is.

A. That is a check for \$2.60 to the City Meat Mkt.

Q. And given for what?

A. Personal expenses.

Q. State whether or not the amount called for by that check was charged to your account and paid through the bank. A. It was.

Mr. ARNOLD.—I offer "Exhibit 44" in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

(Testimony of W. N. Russell.)

To which ruling of the Court an exception was duly reserved.

Whereupon "Exhibit No. 44" was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 417. Big Timber, Mont., Dec. 4th, 1915. Pay to the order of City Meat Market, \$2.60. Pay \$2 and 60 cts. To Scandinavian American Bank, Big Timber, Mont. W. N. Russell. (Back) City Meat Market, Goering Bros.

Q. Drawing your attention to "Exhibit No. 45," I will ask you what that is. [45]

A. A check for \$4.30, drawn in favor of the City Meat Market.

Q. That was given for what?

A. Personal expenses.

Q. State whether or not that check was paid through the Scandinavian American Bank and charged to your account. A. It was.

Mr. ARNOLD.—I offer in evidence "Exhibit 45."

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court an exception was duly reserved.

Whereupon "Exhibit No. 45" was received in evidence and is in words and figures as follows:

W. N. Russell Lumber Co. No. 447. Big Timber, Mont. Jan. 7th, 1916. Pay to the order of City Meat Market, \$4.30. Four and 30/100 Dollars. To Scandinavian American Bank, Big Timber, Mont. W.

(Testimony of W. N. Russell.)

N. Russell. (Back) City Meat Market, Goering Bros.

Q. Mr. Russell, I will call your attention to the claim filed in this case by the Pacific States Lumber Company. I will ask you, Mr. Russell, to turn to that account and state when the indebtedness called for by that account was incurred.

Mr. CAMPBELL.—I object to this for the reason that it is incompetent, irrelevant and immaterial, and not having any bearing on the issues of this hearing. [46]

The COURT.—What is the purpose of it?

Mr. ARNOLD.—The purpose of this is to prove that there was a large amount of merchandise purchased subsequent to the giving of the chattel mortgage that was not paid for in cash as called for and provided for by the provisions of the chattel mortgage, and received into the business of Mr. Russell and used in his business.

The question was read.

The COURT.—The objection will be overruled.

To which ruling of the Court an exception was duly reserved.

A. August 13, 1915.

Q. And the purchase was what?

A. The amount, do you mean?

Q. No, what was it? A. It was lumber.

Q. State whether or not the lumber described in that bill of the Pacific States Lumber Co. was received in your lumber yard subsequent to June 29, 1915, and used in your business. A. It was.

(Testimony of W. N. Russell.)

Q. Prior to your being adjudged a bankrupt. I will ask you, Mr. Russell, the amount of that bill.

A. \$565.12.

Q. Would that be the amount that would have to be paid by you or would there be any deduction for freight?

A. The freight would come out of it. [47]

Q. Can you tell the amount of the freight bill?

A. The freight was \$185.90.

Q. What would be the net amount of the bill.

A. A balance of \$379.22.

Q. State whether or not that amount would be the net amount after the payment of freight.

A. Yes, sir.

Q. Then the cost of the merchandise, or rather the cost of the lumber delivered at Big Timber including freight,—would that be the total amount of the bill, \$565.12?

A. Yes, sir.

Q. State whether or not you paid the freight.

A. I did.

Mr. ARNOLD.—I offer in evidence No. 45, the bill of the Pacific States Lumber Co.

Mr. CAMPBELL.—I object to that for the reason that it is incompetent, irrelevant and immaterial, and hasn't any bearing on the case; and for the further reason that there has been no showing made that the bank in any way or any of its officials gave its consent to the mortgagor to make purchases for other than cash. Absolutely incompetent.

Mr. ARNOLD.—Well, I cannot prove the case all at one time.

(Testimony of W. N. Russell.)

The COURT.—Well, I think it's material and ought to be considered. The objection will be overruled.

To which ruling of the Court an exception was [48] duly reserved.

Whereupon "Exhibit No. 45," being the bill of the Pacific States Lumber Company, was received in evidence.

(Failure to set out the exhibit is for the reason that it has been misplaced and cannot be found.)

Q. Mr. Russell, drawing your attention to "Exhibit No. 46," the proof of claim filed by the Atlas Oil Company, I will ask you to refer to that and state the amount of the account. A. \$154.43.

Mr. ARNOLD.—I offer "Exhibit No. 46" in evidence.

Mr. CAMPBELL.—I object for the reason that it is incompetent, irrelevant and immaterial.

The COURT.—The objection will be overruled.

To which ruling of the Court an exception was duly reserved.

Mr. ARNOLD.—I will withdraw this exhibit for a while, if the Court please, and come back to it later.

Q. Drawing your attention to "Exhibit No. 47," proof of claim of the Eureka Lumber Company, I will ask you, if you can, to state the amount of that claim—drawing your particular attention to the note, copy of the note which is attached to it. Was the original of that note given by you to the Eureka Lumber Company A. It was.

Q. On what date? A. July 1, 1915. [49]

(Testimony of W. N. Russell.)

Q. Can you state what payments were made, if any, on that note by referring to the back of it?

A. Freight bill \$182.51. July 30, check \$50; July 30, check \$48.55; December 2, 1915, \$50. Note \$30, January 30, 1916.

Q. Do you know the balance that is due on that note, Mr. Russell? A. No, I don't.

Q. Those are the only payments that were made on that?

A. That and the freight—well, the freight's in there, yes.

Q. Now, can you state what that note is given for, Mr. Russell, on July 1, 1915?

A. Security on the lumber received from them.

Q. Security or—the note was not secured in any way, was it—just a straight note?

A. I don't know.

Q. Did you give the Eureka Lumber Company any security or any mortgage or anything for the payment of that note?

A. I don't know. There's security on one of them companies, a crop security, and it seemed to me it was them. It was them two. Note secured by crop.

Q. State whether or not they realized anything on the crop? A. No, sir.

Q. The crop—what became of it?

A. It was hauled out. [50]

Q. That note was apparently payable at the Scandinavian American Bank, Mr. Russell, the original was? A. Yes, sir.

(Testimony of W. N. Russell.)

Q. Do you remember whether that, the original of the note, was ever presented to you for payment by the Scandinavian American Bank?

A. No, I don't.

Q. Did you ever talk, as far as you remember, with the Scandinavian American Bank or any officers with relation to this note?

Mr. O'CONNOR.—That is objected to as immaterial.

The COURT.—The objection is overruled.

To which ruling of the Court, an exception was duly reserved.

A. No. I think Mr. Selters held that note for collection, though.

Q. That note, state whether it was given for indebtedness that was contracted prior to June 29, 1915? A. It was, I think.

Q. For merchandise that you were owing for at the time of the giving of the chattel mortgage?

A. Yes, sir.

Q. Drawing your attention to exhibit No. 48, the proof of claim of Santis Forsythe, drawing your attention to that I will ask you the amount of that claim.

A. The claim is \$24.15.

Q. The indebtedness was incurred when? [51]

A. From July 21 to September the 9th.

Q. Of what year? A. 1915.

Q. State whether or not the merchandise represented by that bill was received by you and used in your business subsequent to June 29, 1915?

(Testimony of W. N. Russell.)

A. This bill is new to me; I never seen it before.

Q. Did you receive the merchandise?

A. Not to my knowledge; that is the first time I ever seen that.

Q. Did you during that period of time ever receive anything from Mr. Forsythe?

A. Not that I remember of.

Q. Now, drawing your attention to "Exhibit No. 49," the account of the Eclipse Paint and Manufacturing Co., I will ask you to state the amount of that account, Mr. Russell. A. \$141.05.

Mr. O'CONNOR.—That is objected to, if the Court please; is there any question in here about the amounts of these separate claims?

Mr. ARNOLD.—I want to show by each of these claims the fact that they were,—as far as I can—that they were purchased subsequent to the giving of the chattel mortgage in violation of the terms of chattel mortgage.

Mr. O'CONNOR.—He's got a right under the terms of it to purchase supplies. [52]

Mr. ARNOLD.—For cash or its equivalent.

Mr. O'CONNOR.—And that settlement is a promissory note, my dear sir. If a person receives a note as payment, its equivalent to cash and regarded so in law.

Mr. O'CONNOR.—We object to the introduction of the claim, very immaterial.

The COURT.—The objection is overruled.

To which ruling of the Court, an exception was duly reserved.

(Testimony of W. N. Russell.)

Q. That was for what, Mr. Russell?

A. For paints and oils.

Q. Purchased by you? A. Yes.

Q. And received into your lumber yard?

A. Yes, sir.

Q. What was the date of the purchase?

A. Fourth month, 13, 1915.

Q. That was the date of the purchase?

A. Yes, sir.

Q. What was the date it was due?

Mr. O'CONNOR.—That is objected to as immaterial, the date of its purchase—object to the introduction of the exhibit for the reason that the note itself shows it was purchased before the mortgage was given.

The COURT.—Overruled.

To which ruling of the Court, an exception was duly reserved.

Q. That was an indebtedness existing at the time [53] you gave the chattel mortgage, was it?

A. Yes.

Q. Was that unpaid at the time you were adjudged a bankrupt? A. Part of it was unpaid.

Q. Well, what was the amount unpaid at the time you were adjudged a bankrupt? A. \$141.05.

Q. Now, referring a moment to the amount of the Pacific State's Lumber Company, will you state whether or not that was unpaid at the time that you were adjudged a bankrupt?

A. A part of it was unpaid.

Q. How much?

(Testimony of W. N. Russell.)

A. They received other money than the freight, I think, though I cannot keep these in my head and give you an intelligent answer, I'd simply have to figure out the bills, I'd have to have the original invoices.

Q. Where are those original invoices, if you know? A. They were given to the trustee.

Q. Isn't that the same as the original invoice, you don't have to bother with the proof of claim; please just take their invoice, Mr. Russell.

A. Well, you can believe their statement or not believe it.

Q. Yes. Was that the amount you paid that you purchased from them? A. \$565.12, shows here.

Q. Did you purchase that lumber from them?
[54]

Q. Did you purchase that lumber from them?

A. I expect so.

Q. You paid the amount of freight. Now, did you ever pay them on account, that bill?

A. I don't know. It doesn't show here that I did.

Q. Well, don't you know whether you did or not?

A. No.

Q. Have you got any book that would show it?

A. Those invoices would show it.

Q. Would your invoices show the payments that were made on the account or would it simply be your check book?

A. It shows on the invoices. I put them—I marked it off on the invoice what I still owe them,

(Testimony of W. N. Russell.)

showing on my invoices. Those invoices were a set of books to me.

Q. What is the amount of that account, Mr. Russell? Whose account is that?

A. That is \$565.12. Pacific States Lbr. Co.

Q. I will draw your attention, Mr. Russell, to the schedule that you filed in this—schedule of your liabilities, and I will ask you to refer to that schedule and say whether you did not, in making up your account of liabilities, list the Pacific States Lumber Company.

Mr. O'CONNOR.—That is objected to for the reason that the list of liabilities itself is the best evidence of what it contained.

The COURT.—Overruled.

To which ruling of the Court, an exception was [55] duly reserved.

Noon recess.

Reconvening, examination was continued.

The last question was read.

A. Yes.

Q. Now, are you in a position now to state, Mr. Russell, with reference to the Pacific States Lumber Company account, what amount was due at the time the petition in bankruptcy was filed against you?

A. \$379.22.

Q. And that was all for merchandise purchased subsequently to the giving of the chattel mortgage?

A. Yes.

Q. Now, with reference to the account of the Atlas Oil Company, "Exhibit No. 46," are you in a posi-

(Testimony of W. N. Russell.)

tion now to state what was the amount due at the time you filed your petition in bankruptcy?

A. \$154.43.

Q. State whether or not that was due at a prior time at which the chattel mortgage was given.

A. Yes.

Q. Drawing your attention to "Exhibit 50," the account of Bloedel Donovan Lumber Company, I will ask you what was due to the Bloedel Donovan Lbr. Company at the time you filed your petition in bankruptcy. A. \$621.56.

Q. Will you state whether that was for merchandise that they sold and delivered to you subsequent [56] to the 29th day of June, 1915, when this chattel mortgage was given?

A. That was bought after the mortgage was given.

Q. And state what it was that was bought?

A. Lumber.

Q. State whether or not that lumber was received and used in your business. A. It was.

Q. Subsequent to June 29, 1915? A. Yes, sir.

Q. It was unpaid at the time you filed your petition in bankruptcy? A. It was.

Q. Drawing your attention to Exhibit No. 51, the claim of the Northwestern Lumber & Shingle Co., I will ask you the amount that was due at the time you filed your petition in bankruptcy, to the Northwestern Lumber and Shingle Company.

A. \$575.00 and interest at 8 per cent.

Q. And that was unpaid, was it?

A. Yes, sir.

(Testimony of W. N. Russell.)

Q. Now, that was represented by what, Mr. Russell? A. By two notes.

Q. Those notes were given—can you state when, prior to June 29, 1915—before?

A. I think they were.

Q. Now, then, those payments that are made as shown by the statement, two 50-dollar payments and one 25-dollar payment. Can you state who those payments were made to, or whether to an attorney [57] or whether made direct.

A. They were either made direct or to their bank.

Q. Can you state whether or not those were the payments that were made, to Mr. Selters?

A. No. I don't think that they were, either one.

Q. State whether or not \$700 is the amount that was owing to those people at the time that that chattel mortgage was given. A. Yes.

Q. I think you said it was represented by two notes, did you not? A. Yes.

Q. What were those notes given for?

A. For merchandise.

Q. That was received in your lumber yard prior to the giving of the chattel mortgage? A. Yes.

Q. Drawing your attention to Exhibit No. 52, the account of the McCormick Lumber Company filed, and proof of claim. I will ask you the amount of that account at the time—due to those people at the time you filed your petition in bankruptcy.

A. \$750.50.

Q. State whether or not that was for an indebtedness that was due and owing to them at the time you

(Testimony of W. N. Russell.)

gave the chattel mortgage in June, 1915? A. Yes.

Q. Then it is or was an obligation owing to the McCormick Lumber Co. at the time you gave this chattel mortgage—it hasn't been paid, has it? [58]

A. No.

Mr. ARNOLD.—I reoffer in evidence “Exhibits 45, 46, 50 and 52.”

Mr. CAMPBELL.—I object to the introduction of those claims for the reason that they are incompetent, irrelevant and immaterial. They have no bearing on the issues in this hearing, and for the further reason that it is not shown that the bank or any of its officers had knowledge that Mr. Russel had contracted these obligations.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

Whereupon “Exhibits No. 45” (having been subsequently located) “No. 46, No. 50 and No. 52,” were received in evidence and are in words and figures as follows:

Exhibit No. 46:

Statement. Cleveland, O. 3-21-1916. W. N. Russell Lbr. Co. Big Timber, Mont. In acc't. with The Atlas Oil Company, Lubricating Lard & Miners Oils, Old English Mixed Paints, Ebony Roof Paints. 18-1 gal. outside Old Eng. Pt. White Eng. Pt. @ 140 25.20. 6-1/2 gal. Outside White @ 145 \$4.35. 12-1/2 gal. inside White @ 1.45 \$8.70. 12-1/4 gal. inside White @ 1.50, \$4.50. 6-1 gal. #44 @ 1.40, \$8.40. 6-1 gal. #62 @ 1.40, \$8.40. 6-1 gal.

154 *Scandinavian Am. Bk. of Big Timber, Mont.*

(Testimony of W. N. Russell.)

#63 @ 1.40, \$8.40. 6-1 gal. #57 @ 1.40, \$8.40. 6-1 gal. #59 @ 1.40, \$8.40. 6-1 gal. 65 @ 1.40, \$8.40. 6-1 [59] gal. 46 @ 1.40, \$8.40. 3-1 gal. 27 @ 1.40, \$4.20. 6-1 gal. 23 @ 1.40, \$8.40. 3-1 gal. 51 @ 1.40, \$4.20. 3-1 gal. 84 @ 1.40, \$4.20. 6-1½ gal. 84, Old Eng. Flat pt. @ 1.45, \$4.35. 6-1 gal. White Old Eng. Pt. @ 1.40, \$8.40. 3-1 gal. tan @ 1.40, \$4.20. 3-1 gal. Eb. Green @ 1.40, \$4.20. 3-5 gal. Red Barn Pt. @ .75, \$11.25. 6-1 gal. Red. Barn Pt. @ .80, \$4.80. 6-1 gal. Old Eng. Perm. floor Finish, @ 1.80, \$10.80. 6-1½ gal. @ 1.90, \$5.70. 2¼ Bls. Outside Pt. @ 1.30, \$78.00 2-5 gal. D R Olive Old Eng. barn Pa. @ 80, \$7.50. 6-1 gal. D. R. Olive Old Eng. Shingle St. @ .80, \$4.80. 6-5 gal. #T 30, @ 80, \$4.00. 6-5 gal. 125, @ .80, \$4.00. 2-5 gal. 127 @ \$8.00. 4¼ gal eb. green Old Eng. Carriage @ 1.80, \$1.80. 4-¼ gal. Vermillion @ 1.80, \$1.80. 4-¼ gal. Red, @ 1.80, \$1.80. 6-1⅛ gal. eb. Oak Old Eng. Varnish @ 1.85, \$1.39. 6-1⅛ DK Oak @ 1.85, \$1.39. 6-1⅛ DK Cherry @ 1.85, \$1.39. 6-1⅛ gal. DK Rosewood Old Eng. Shingle Stain, \$1.39.

Total of bill\$293.51

8/21 ck. on account 25.00

3/15 Freight Bill received 57.08

\$211.43

11-22-15 on account 25.00

12-11-15 " " .. 25.00

2- 8-16 " " 7.00

\$154.43

(Testimony of W. N. Russell.)

In the District Court of the United States, for the District of Montana. In the matter of W. N. [60] Russell Lbr. Co., Big Timber, Mont., Bankrupt.

At Cleveland in the county of Cuyahoga and State of Ohio, on the 21st day of March A. D. 1916, came R. A. Walker of Cleveland, in the county of Cuyahoga, and State of Ohio, and made oath, and says, that he is treasurer of the Atlas Oil Co., a corporation incorporated by and under the laws of the State of Ohio, and carrying on business at Cleveland, in the county of Cuyahoga, and State of Ohio, and that he is duly authorized to make this proof, and says that the said W. N. Russell Lbr. Co., the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is justly and truly indebted to said corporation in the sum of one hundred fifty-four and $43/100$ dollars, and interest after —; that the average due date of said claim was —.

That the consideration of said debt is as follows: Merchandise as per statement attached, marked Exhibit "A."

That no part of said debt has been paid (except —); that there are no set-offs or counter-claims to the same (except —); and that said corporation has not, nor has any person by its order or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever; that no note has been received for said claim, that no judgment has been rendered thereon, except as herein mentioned. [61]

(Testimony of W. N. Russell.)

The Atlas Oil Company, a corporation organized under and by virtue of the laws of the State of Ohio with its principal place of business located at Cleveland, in the county of Cuyahoga and State of Ohio, by its duly authorized treasurer, does hereby authorize J. B. Selters, attorney of Big Timber, Mont., or any one of them, to attend the meeting or meetings of creditors of the bankrupt aforesaid at a court of bankruptcy, wherever advertised or directed to be holden, on the day and at the hour appointed and notified by said Court in said matter, or at such place and time as may be appointed by the Court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion for it and in its name to vote for or against any proposal or resolution that may be then submitted under the acts of Congress relating to bankruptcy; and in the choice of trustee or trustees of the estate of the said bankrupt, and for it to assent to such appointment of trustee, with like powers to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due it under any composition, and for any other purpose [62] in its interest whatsoever, with full power of substitution.

In witness whereof, this instrument is signed and

(Testimony of W. N. Russell.)

sealed in the name of said corporation by its treasurer this 21st day of March, 1916.

ATLAS OIL CO. L. S.

By R. A. WALKER,
Treasurer, L. S.

Subscribed and sworn to by said R. A. Walker before me this 21st day of March, A. D. 1916.

[Notarial Seal] L. A. FREEMAN,
Notary Public.

United States of America,
Northern District of Ohio,—ss.

R. A. Walker, being first duly sworn, deposes and says that the above power of attorney was executed on behalf of a corporation, and that he is a duly authorized officer of said corporation.

R. A. WALKER.

Subscribed and sworn to before me this 21st day of March, A. D. 1916, by the said R. A. Walker, who is personally known to me to be the identical person named.

[Notarial Seal] L. A. FREEMAN,
Notary Public.

(Back) United States District Court, District of Montana. In the matter of W. N. Russell Lbr. Co. Big Timber, Mont. Bankrupt. Deposition for proof of debt due corporation. Claim, Atlas Oil Co., Cleveland, Ohio. Amount due \$154.43.

Exhibit No. 45:

Freight Bill. Northern Pacific. Big Timber, Mont. Aug. 24, 1915. Station. Consignee W. N.

(Testimony of W. N. Russell.)

[63] Russell Lbr. Co. Freight Bill No. 1235. To Northern Pacific Railway Company, Dr. for charges on articles transported: Waybilled from Selleck Wn. Waybill date and No. 8-14-15 140. Full name of shipper, P. S. L. Co. Car initials and No. 4144. Number of packages, articles and marks: 3000 ft. cedar B siding, 1650 lbs. 125 M star shgs @ 160 Per M 20,000 lbs. rate; 42 freight, 90.95.

Bal. car filled fir lbr. 27,130 lbs. rate, 35, freight, 94.95. Total \$185.90. Lded. full viz capy. Order 3795. Invoice 6748. Received payment 8-25, 1915, Jay Loving, Agent. H.

Pacific States Lumber Co. Mineral Lake Lumber Co., General Offices 822 Tacoma Building, Tacoma, Wash., August 13th, 1915. Sold to W. N. Russell Lumber Co., Big Timber, Montana. Shipped to Same. via NP Invoice No. 6748. Our order No. PS-3795. Buyer's order No. — Salesman's Order No. FWS 20. Car NP 41144/40/80/380/3000. Fir 35¢; cedar 42¢. F O B Terms 2% fifteen days from date of invoice. 1% thirty days or net sixty days from date of invoice. Triplicate.

Orders made to either of these companies are handled in common. Only one account is necessary. Make all remittances read in favor of A. Cookingham, Treasurer.

2	1 x 8	6	#2 Common Shiplap	8
34		8	“ “	181
72		10	“ “	480
283		12	“ “	2,264

(Testimony of W. N. Russell.)

150	14	Common Shiplap	1,400
230	16	" "	2,453
4	18	" "	48
1	20	" "	13

6,847 13.50 92.43

72	1 x 6	8	#1 Common Shiplap	288
184	10		" "	920
316	12		" "	1,896
257	14		" "	1,799
309	16		" "	2,472
19	18		" "	171
1	20		" "	10

7,556 15.75 119.01

110	1/2 x 6	10	Clear R. C. Bevel Siding	550
110	12		" "	660
110	14		" "	770
130	16		" "	1,040

3,020 21.50 64.93

10M Fir Lath 3.50 35.00

125M Extra A R. C.

Shingles 2.03 253.75.

17,423' \$565.12

Mailed 8-20 B. Car loaded to full visible capacity. B/L attached. Prices O K Extns O K Heading O K B/L O K—M. Weight Gross 86780, Tare 380— Net 48,780.

List: 3020 @ 700—2114; 14403 @ 2000—28806.

(Testimony of W. N. Russell.)

17423.—10 @ 500—5000. 125 @ 160—20,000. Total, 55,920.

Hayden, Langhorne & Metzger, Tacoma Building, Tacoma. In the District Court of the United [65] States, for the District of Montana. In the Matter of W. N. Russell Lumber Company, and W. N. Russell, Bankrupts. (In Bankruptcy.) No. ——. Proof of Claim.

At Tacoma, in the Western District of Washington, on the 30th day of March, 1916, came Albert Cookingham, of Tacoma, in the county of Pierce, State of Washington, and made oath and says: that he is the treasurer of the Pacific States Lumber Company, a corporation incorporated under and by virtue of the laws of the state of Washington, and carrying on business at Tacoma in the county of Pierce and state of Washington; that he is duly authorized to make this proof, and says that the said W. N. Russell Lumber Company, against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is justly and truly indebted to said corporation in the sum of Three Hundred Seventy-nine and 22/100 (\$379.22) Dollars; that the consideration of said debts is lumber and shingles sold and delivered to the said W. N. Russell Lumber Company as set forth upon the invoice hereto attached; that no part of said debt has been paid, except the sum of One Hundred Eighty-five and 90/100 (\$185.90) Dollars, being the freight upon said shipment of lumber and shingles, and for which credit

(Testimony of W. N. Russell.)

has been given upon the total invoice price of Five Hundred Sixty-five and 12/100 (\$565.12) Dollars; that there are no setoffs or counterclaims to said debt, and [66] that there is now due and owing to the Pacific States Lumber Company the full sum of Three Hundred Seventy-nine and 22/100 (\$379.22) Dollars, and that said corporation has not, nor has any person by its order or to the knowledge or belief of said deponent, for its use had or received any manner of security for said debt whatever.

ALBERT COOKINGHAM.

Treasurer of Pacific States Lumber Company.

Subscribed and sworn to before me this 30th day of March, 191y.

[Notarial Seal]

F. D. METZGER,

Notary Public for the State of Washington, residing at Tacoma.

Letter of Attorney: To Frank Arnold, Esq., Attorney at Law: You are hereby authorized by said creditor to appear for and represent said creditor and vote for said creditor in any proceedings or meetings which may be had or called in the above-entitled proceeding, in court, before the referee in bankruptcy or elsewhere and particularly to vote for said creditor in the choice of a trustee of said bankrupt whenever such election is held, or in your discretion oppose confirmation of any composition offered by or in behalf of said bankrupt, and to receive and receipt for any and all moneys which may be or may become payable said creditor therein or

(Testimony of W. N. Russell.)

17423.—10 @ 500—5000. 125 @ 160—20,000. Total, 55,920.

Hayden, Langhorne & Metzger, Tacoma Building, Tacoma. In the District Court of the United [65] States, for the District of Montana. In the Matter of W. N. Russell Lumber Company, and W. N. Russell, Bankrupts. (In Bankruptcy.) No. ——. Proof of Claim.

At Tacoma, in the Western District of Washington, on the 30th day of March, 1916, came Albert Cookingham, of Tacoma, in the county of Pierce, State of Washington, and made oath and says: that he is the treasurer of the Pacific States Lumber Company, a corporation incorporated under and by virtue of the laws of the state of Washington, and carrying on business at Tacoma in the county of Pierce and state of Washington; that he is duly authorized to make this proof, and says that the said W. N. Russell Lumber Company, against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is justly and truly indebted to said corporation in the sum of Three Hundred Seventy-nine and 22/100 (\$379.22) Dollars; that the consideration of said debts is lumber and shingles sold and delivered to the said W. N. Russell Lumber Company as set forth upon the invoice hereto attached; that no part of said debt has been paid, except the sum of One Hundred Eighty-five and 90/100 (\$185.90) Dollars, being the freight upon said shipment of lumber and shingles, and for which credit

(Testimony of W. N. Russell.)

has been given upon the total invoice price of Five Hundred Sixty-five and 12/100 (\$565.12) Dollars; that there are no setoffs or counterclaims to said debt, and [66] that there is now due and owing to the Pacific States Lumber Company the full sum of Three Hundred Seventy-nine and 22/100 (\$379.22) Dollars, and that said corporation has not, nor has any person by its order or to the knowledge or belief of said deponent, for its use had or received any manner of security for said debt whatever.

ALBERT COOKINGHAM.

Treasurer of Pacific States Lumber Company.

Subscribed and sworn to before me this 30th day of March, 191y.

[Notarial Seal]

F. D. METZGER,

Notary Public for the State of Washington, residing at Tacoma.

Letter of Attorney: To Frank Arnold, Esq., Attorney at Law: You are hereby authorized by said creditor to appear for and represent said creditor and vote for said creditor in any proceedings or meetings which may be had or called in the above-entitled proceeding, in court, before the referee in bankruptcy or elsewhere and particularly to vote for said creditor in the choice of a trustee of said bankrupt whenever such election is held, or in your discretion oppose confirmation of any composition offered by or in behalf of said bankrupt, and to receive and receipt for any and all moneys which may be or may become payable said creditor therein or

(Testimony of W. N. Russell.)

for or on account of said debt.

In witness whereof said creditor has hereunto by its proper officers signed their name and caused their seal to be affixed, when signing the deposition [67] preceding, this 30th day of March, 1916.

PACIFIC STATES LUMBER COMPANY.

By ALBERT COOKINGHAM,

Its Treasurer.

Subscribed and sworn to before me this 30th day of March, 1916.

[Notarial Seal]

F. D. METZGER,

Notary Public in and for said State and County,
residing at Tacoma.

Revenue Stamp.

(Back.) In the United States District Court for the District of Montana. In the Matter of W. N. Russell Lumber Company and W. N. Russell, Bankrupts. Proof of Claim. Frank Arnold and Hayden, Langhorne & Metzger, Attorneys for Claimant.

Exhibit No. 50:

Statement, Bloedel Donovan Lumber Mills. Bellingham, Wash., 1-21-1916. W. N. Russell L. Co., Big Timber, Mont.

Oct. 6 car 29130	527 75	
Less freight pd.	257 10	270 65
" 28 car 43893	570 86	
Less freight pd.	219 95	350 91
		<hr/>
Balance due		621 56

(Testimony of W. N. Russell.)

In the District Court of the United States, for the District of Montana. In the matter of W. N. Russell doing business under the name and style of W. N. Russell Lumber Company and W. N. Russell as an individual. Bankrupt. In Bankruptcy.

At Bellingham, in the State of Washington, on [68] the — day of March, A. D. 1916, came J. H. Prentice, of Bellingham, in the county of Whatcom, and State of Washington, and made oath and says that he is secretary of the Bloedel-Donovan Lumber Mills, a corporation incorporated by and under the laws of the State of Maine, and carrying on business at Bellingham in the county of Whatcom, and State of Washington, and that he is duly authorized to make this proof, and says that the said W. N. Russell, the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition and still is, justly and truly indebted to said corporation in the sum of Six Hundred Twenty-one and 56/100 (\$621.56) Dollars; that the consideration of said debt is as follows: Goods, *wres* and merchandise sold and delivered to said bankrupt upon open account as per bill of items hereto attached and marked exhibit "A," said goods, wares and merchandise being sold and delivered at the special instance and request of said debtor, together with interest from October 17th, 1915. That the amount of said account is now due. That no part of said debt has been paid—that there are no setoffs or counterclaims to the same—and the said

(Testimony of W. N. Russell.)

corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever; and that no note has been received for said debt and no judgment recovered thereon [69] except as herein mentioned:

J. H. PRENTICE,

Secretary of said Corporation.

Subscribed and sworn to before me this 21st day of March, A. D. 1916.

[Notarial Seal]

C. E. CASTLE,

Notary in and for the State of Washington.

United States District Court, District of Montana. Power of Attorney: In the Matter of W. N. Russell doing business under the name and style of W. N. Russell Lumber Company, and W. N. Russell as an individual. Bankrupt.

KNOW ALL MEN BY THESE PRESENTS, that the undersigned, Bloedel-Donovan Lumber Mills, a corporation existing under the laws of the State of Maine hereby makes, constitutes and appoints Frank Arnold, of Livingston, Montana, its true and lawful attorney, for it and in its name, to attend and vote for it at any and all meetings of creditors for the purpose of electing trustees of the estate of said bankrupt, and any and all other purposes; and generally to act for it and to perform any and all acts and things whatsoever necessary or expedient to be done in said matter; and to receive for it payments of dividends or other money due, or to be-

(Testimony of W. N. Russell.)

come due to it; to make and consent for it to any and all compositions in said matter as he shall deem for its best interests; hereby granting unto our said attorney full and complete power to do and perform any and all things pertaining to said matter the same as if it were present by its proper [70] officers.

In Witness Whereof, It has caused these presents to be signed in its corporate name by its President and its corporate seal to be hereto attached by authority of its Board of Directors, this 21st day of March, 1916.

Signed, sealed and delivered in presence of J. K. Kellyms, F. L. Mickle.

[Notarial Seal.]

BLOEDEL-DONOVAN LUMBER MILLS.

By J. H. BLOEDEL,

President.

State of Washington,

County of Whatecom,—ss.

On this 21st day of March, 1916, before me appeared J. H. Bloedel, to me personally known, who, being by me duly sworn, did say that he is the President of Bloedel-Donovan Lumber Mills, that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was executed in behalf of said corporation by authority of its Board of Directors; and the said J. H. Bloedel acknowledged said instrument to be the free

(Testimony of W. N. Russell.)

act and deed of said corporation.

C. E. CASTLE,

Notary Public Whatcom County, State of Washington.

My commission expires September 14, 1917. (Notarial seal.)

Exhibit No. 52:

McCormick, Wash., 12-12-1915. W. N. Russell Lbr. Co., Big Timber, Mont. In account with McCormick Lumber Co. [71]

May 20	22850	739 29	
	Freight	197 54	541 75
" 25	45373	427 75	
	"	189 —	238 75
			<hr/> 780 50

ck recd	30 50
"	32 50
	<hr/> 63 00

Protested ck	
and charges 33	30 00
	<hr/> 750 50

In the District Court of the United States, for the District of Montana. In the matter of W. N. Russell doing business under the name and style of W. N. Russell Lumber Company, and W. N. Russell as an individual. Bankrupt. In Bankruptcy.

At McCormick, in the State of Washington, on the 27th day of March, A. D. 1916, came A. N. Riggs, of McCormick, in the county of Lewis and State of

(Testimony of W. N. Russell.)

Washington, and made oath and says that he is treasurer of the McCormick Lumber Company, a corporation incorporated by and under the laws of the State of and carrying on business at McCormick in the county of Lewis and State of Washington, and that he is duly authorized to make this proof, and says that the said W. N. Russell, the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said corporation in the sum of Seven Hundred [72] Fifty and 50/100 (\$750.50) Dollars; that the consideration of said debt is as follows: Goods, wares and merchandise sold and delivered to said bankrupt upon open account as per bill of items hereto attached and marked exhibit "A," said goods, wares and merchandise being sold and delivered at the special instance and request of said debtor, together with interest from May 22, 1915. That the amount of said account is now due. That no part of said debt has been paid—that there are no setoffs or counterclaims to the same—and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever; and that no note has been received for said debt and no judgment recovered thereon except as herein mentioned.

A. N. RIGGS,
Treasurer of said Corporation.

(Testimony of W. N. Russell.)

Subscribed and sworn to before me this 27th day of March, A. D. 1916.

[Seal]

GEO. D. McCORMICK,

Notary Public.

United States District Court, District of Montana.
Power of Attorney. In the Matter of W. N. Russell doing business under the name and style of W. N. Russell Lumber Company, and W. N. Russell as an individual. Bankrupt.

KNOW ALL MEN BY THESE PRESENTS: That the undersigned McCormick Lumber Company, a corporation existing under the laws of the State of Oregon hereby makes, constitutes and appoints Frank Arnold [73] of Livingston, Montana, its true and lawful attorney, for it and in its name, to attend and vote for it at any and all meetings, of creditors for the purpose of electing trustees of the estate of said bankrupt, and any and all other purposes; and generally to act for it and to perform any and all acts and things whatsoever necessary or expedient to be done in said matter; and to receive for it payments of dividends or other money due, or to become due it; to make and consent for it to any and all compositions in said matter as he shall deem for its best interests; hereby granting unto our said attorney full and complete power to do and perform any and all things pertaining to said matter the same as if it were present by its proper officers.

In Witness Whereof, It has caused these presents to be signed in its corporate name by its vice-president, and its corporate seal to be hereto attached by

(Testimony of W. N. Russell.)

authority of its board of directors, this 27th day of March, 1916.

McCORMICK LUMBER COMPANY.

By GEO. D. McCORMICK,

Vice-president.

Signed, sealed and delivered in presence of John Leigh, J. F. Longhron, Jr.

State of Washington,

County of Lewis.

On this 27th day of March, 1916, before me appeared Geo. D. McCormick, to me personally known, who, being by me duly sworn, did say that he is the vice-president of McCormick Lumber Company, that [74] the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was executed in behalf of said corporation by authority of its Board of Directors; and the said Geo. D. McCormick acknowledged said instrument to be the free act and deed of said corporation.

SILAS SAGE,

Notary Public, Lewis County, State of Washington.

My commission expires —, 19—.

Q. Drawing your attention to "Exhibit No. 53," the account of the Central Door & Lumber Co., I will ask you what was the amount of the account due and owing those people at the time you filed this petition in bankruptcy? A. \$528.94.

Q. State whether or not that was for merchandise sold prior to the giving of the chattel mortgage or after—purchased and received. A. Yes.

170 *Scandinavian Am. Bk. of Big Timber, Mont.*

(Testimony of W. N. Russell.)

Q. When?

A. It was received before the giving of the chattel mortgage.

Q. State whether or not that amount was due and owing at the time the mortgage was given from you to the Central Door and Lumber Company.

A. Yes, sir.

Mr. ARNOLD.—I offer “Exhibit 53” in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

[75]

To which ruling of the Court, an exception was duly reserved.

Whereupon “Exhibit No. 53” was received in evidence and is in words and figures as follows:

Portland, Oregon. W. N. Russell, Big Timber, Mont. In account with Central Door & Lumber Co.

Mar. 26, 406.75

Apr. 29, 243 14

30, 66 25

716 14

Cr

Apr. 8 Mdse

187 20

Bal.

528 94

In the District Court of the United States, for the District of Montana. In the matter of W. N. Russell doing business under the name and style of W. N. Russell Lumber Company, and W. N. Russell as an individual, Bankrupt. In Bankruptcy.

At Portland, in the State of Oregon, on the 20th day of March, A. D. 1916, came R. N. Banks (or

(Testimony of W. N. Russell.)

Parks) of Portland, in the county of Multnomah and State of Oregon, and made oath and says that he is treasurer of the Central Door & Lumber Company a corporation incorporated by and under the laws of the State of Oregon, and carrying on business at Portland in the county of Multnomah and State of Oregon, and that he is duly authorized to make this proof, and says that the said W. N. Russell, the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still [76] is, justly and truly indebted to said corporation in the sum of Five Hundred Twenty-eight and 94/100 (\$528.94) dollars; that the consideration of said debt is as follows: Goods, wares and merchandise sold and delivered to said bankrupt upon open account as per bill of items hereto attached and marked exhibit "A," said goods, wares and merchandise being sold and delivered at the special instance and request of said debtor, together with interest from 8th day of April, 1915. That the amount of said account is now due. That no part of said debt has been paid—that there are no setoffs or counterclaims to the same—and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever; and that no note has been received for said debt and no judgment recovered thereon except as herein mentioned.

[Notarial Seal]

R. N. PARKS,

Treasurer of said Corporation.

(Testimony of W. N. Russell.)

Subscribed and sworn to before me this 20th day of March.

W. W. WOODCOCK,
Notary Public.

My commission expires September 2, 1916.

United States District Court; District of Montana.
Power of Attorney. In the matter of W. N. Russell *Lumber* doing business under the name and style of W. N. Russell Lumber Company and W. N. Russell as an individual. Bankrupt.

KNOW ALL MEN BY THESE PRESENTS:
That the undersigned [77] Central Door & Lumber Company, a corporation, existing under the laws of the State of Oregon hereby makes, constitutes and appoints Frank Arnold of Livingston, Montana, its true and lawful attorney, for it and in its name, to attend and vote for it at any and all meetings of creditors for the purpose of electing trustees of the estate of said bankrupt, and any and all other purposes; and generally to act for it and to perform any and all acts and things whatsoever necessary or expedient to be done in said matter; and to receive for it payments of dividends or other money due, or to become due it; to make and consent for it to any and all compositions in said matter as he shall deem for its best interests; hereby granting unto our said attorney full and complete power to do and perform any and all things pertaining to said matter the same as if it were present by its proper officers.

In Witness Whereof, It has caused these presents

(Testimony of W. N. Russell.)

to be signed in its corporate name by its President and its corporate seal to be hereto attached by authority of its Board of Directors, this 20th day of March, 1916.

[Corporate Seal]

CENTRAL DOOR & LUMBER CO.

By A. F. BILES,
President.

Signed, sealed and delivered in presence of

State of Oregon,
County of Multnomah,—ss.

On this 20th day of March, 1916, before me appeared [78] A. F. Biles, to me personally known, who, being by me duly sworn, did say that he is the president of Central Door & Lumber Company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was executed in behalf of said corporation by authority of its Board of Directors; and the said A. F. Biles acknowledged said instrument to be the free act and deed of said corporation.

[Seal]

W. W. WOODCOCK,
Notary Public Multnomah County, State of Oregon.

My commission expires Sept. 2, 1916.

Q. Drawing your attention now to "Exhibit No. 54," or proof of claim, of the Dakota Plaster Co., and I will ask you the amount of that claim.

A. \$49.40.

Q. State whether or not that was the amount that

(Testimony of W. N. Russell.)

was due at the time you filed your petition in bankruptcy—and owing. A. Yes, sir.

Q. Now, state, Mr. Russell, whether the merchandise that that represented was merchandise that was purchased before you gave the chattel mortgage or after. A. That was after.

Q. And what was the date that you bought that?

A. March 6, 1916.

Q. No.

A. Isn't it? Oh—that is a statement—it was the 8th month, 25—1915. [79]

Q. That would be the 25th day of August, would it?

A. Yes, sir.

Q. State whether that merchandise purchased from the Dakota Plaster Co. was received by you and taken into your business and used in your business in Big Timber. A. It was.

Mr. ARNOLD.—I offer in evidence “Exhibit 54.”

Mr. MILLER.—I think that is clearly objectionable. We object to it for the same reason as to the previous offerings.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

Whereupon “Exhibit No. 54” was received in evidence and is in words and figures as follows:

Rapid City, S. D. March 6, 1916. W. N. Russell Lumber Co., Big Timber, Mont. To Dakota Plaster Co.

(Testimony of W. N. Russell.)

Dr.

8—25—15 Car #74724 \$131.50

Credit:

Freight \$14.00

“ 60.00

10—26—15 Bags returned 10.00 84.00

\$47.50

Int. 6 mos. 8% 1.90

\$ 49.40

*In the District Court of the United States, for the
District of Montana.*

In the Matter of W. N. RUSSELL, Doing Business
Under the Firm Name and Style [80] of
W. N. RUSSELL LUMBER COMPANY
and W. N. RUSSELL, as an Individual,
Bankrupt.

IN BANKRUPTCY.

At Rapid City, in the State of South Dakota, on
the 29th day of March, A. D. 1——, came A. M. Lan-
phere of Rapid City, in the county of Pennington,
and State of South Dakota, and made oath and says
that he is Treasurer of the Dakota Plaster Company,
a corporation incorporated by and under the laws
of the State of South Dakota, and carrying on busi-
ness at Rapid City in the county of Pennington, and
State of South Dakota, and that he is duly authorized
to make this proof, and says that the said W. N. Rus-

(Testimony of W. N. Russell.)

sell, the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said corporation in the sum of Forty-seven and 50/100 (\$47.50) dollars; that the consideration of said debt is as follows: Goods, wares and merchandise sold and delivered to said bankrupt upon open account as per bill of items hereto attached and marked Exhibit "A," said goods, wares and merchandise being sold and delivered at the special instance and request of said debtor, together with interest from the 25th day of August, 1915. That the amount of said account is now due. That no part of said debt has been paid; that there are no set-offs or counterclaims to the same; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said [81] deponent, for its use, had or received any manner of security for said debt whatever; and that no note has been received for said debt and no judgment recovered thereon except as herein mentioned.

A. M. LANPHERE,
Secretary of Said Corporation.

Subscribed and sworn to before me this 27th day of March, A. D. 1916.

[Seal]

C. N. LAWS,
Notary Public.

United States District Court; District of Montana; Power of Attorney. In the matter of W. N. Russell, doing business under the name and style of W. N.

(Testimony of W. N. Russell.)

Russell Lumber Company, and W. N. Russell as an individual, Bankrupt.

KNOW ALL MEN BY THESE PRESENTS: That the undersigned, Dakota Plaster Company, a corporation, existing under the laws of the State of South Dakota, hereby makes, constitutes and appoints Frank Arnold, its true and lawful attorney, for it and in its name, to attend and vote for it at any and all meetings of creditors for the purpose of electing trustees of the estate of said bankrupt, and any and all other purposes; and generally to act for it and to perform any and all acts and things whatsoever necessary or expedient to be done in said matter; and to receive for it payments of dividends or other money due, or to become due it; to make and consent for it to any and all compositions in said matter as he shall deem for its best interests; hereby granting unto our said attorney full and [82] complete power to do and perform any and all things pertaining to said matter the same as if it were present by its proper officers.

In Witness Whereof, It has caused these presents to be signed in its corporate name by its President and its corporate seal to be hereto attached by authority of its Board of Directors, this 25th day of March, 1916.

[Seal] DAKOTA PLASTER COMPANY.

By JOSEPH JAY,
President.

Signed, sealed and delivered in presence of Juale E. Cleghour, Fred C. McCain.

(Testimony of W. N. Russell.)

State of South Dakota,
County of Pennington,—ss.

On this 27th day of March, 1916, before me appeared Joseph Jay to me personally known, who, being by me duly sworn, did say that he is the president of Dakota Plaster Company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was executed in behalf of said corporation by authority of its board of directors; and the said Joseph Jay acknowledged said instrument to be the free act and deed of said corporation.

C. N. LAWS,
Notary Public Pennington County, State of South
Dakota.

My commission expires May 6, 1919.

Q. Drawing your attention to "Exhibit No. 47," the claim of the Eureka Lumber Company, as shown by the copy of the note attached to the claim; state whether that note was given for merchandise [83] that was purchased before you gave the chattel mortgage. A. It was.

Q. And state the amount that was due at the time you gave the chattel mortgage to the Eureka Lumber Company as shown by that note. A. \$681.06.

Q. Do you know what part of that has been paid since the giving of the chattel mortgage?

A. July 10th, \$182.51, paid. July 20, \$50—July 20, \$48.55—December 2, 1915, \$50—January 13, 1916, \$30.

Q. The balance then is owing, or was owing at the

(Testimony of W. N. Russell.)

time that you filed your petition in bankruptcy, was it? A. Yes, sir.

Q. Now, drawing your attention to "Exhibit No. 55," Mr. Russell, the account of the McKee Lumber Company: will you state the amount that was due at the time you filed your petition in bankruptcy?

A. \$494.64.

Q. And unpaid at that time? A. Yes, sir.

Q. Now a debt, is it? A. Yes, sir.

Q. Will you state when the merchandise was purchased that that account represents?

A. August 26, \$——August 26, 1915 and September 18th, 1915.

Q. What credits has there been in that account?
[84]

A. The freight has been deducted.

Q. State whether or not the merchandise that was represented—purchased from the McKee Lumber Co. on the dates that you've stated was received in the lumber yards of the Russell Lumber Company and used in its business. A. It was.

Q. You stated that those two purchases were made August 26 and September 18th: Now, is that correct? Shouldn't that be, the purchase August 26 and October 25 and the freight paid September 18 and November 18th? A. Yes. Yes.

Q. All in 1915? A. Yes, sir.

Mr. ARNOLD.—I offer "Exhibit 55" in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

(Testimony of W. N. Russell.)

To which ruling of the Court, and exception was duly reserved.

Whereupon "Exhibit No. 55" was received in evidence and is in words and figures as follows:

Seattle, Wash., Dec. 20, 1915. W. N. Russell Lbr. Co., Big Timber, Mont., In account with McKee Lbr. Co.

	Invoice.	Car,		
Aug. 26	3938	NP 85746	417.83	
Sep. 18			E B	224 70
Oct. 25	4042	NP 47340	544 76	
Nov. 18			E B	243 25
	Balance due us			494 64
				<hr/>
			962 59	962 59
Dec. 20	Balance due		494 64	

[85]

United States District Court, District of Montana, Power of Attorney. In the Matter of W. N. Russell, doing business under the name and style of W. N. Russell Lumber Company, and W. N. Russell, as an individual. Bankrupt:

KNOW ALL MEN BY THESE PRESENTS, That the undersigned W. I. McKee hereby makes, constitutes and appoints Frank Arnold of Livingston, Montana, his true and lawful attorney, for him and in his name, to attend and vote for him at any and all meetings of creditors for the purpose of electing trustees of the estate of said bankrupt, and any and all other purposes; and generally to act for him and to perform any and all acts and things

(Testimony of W. N. Russell.)

whatsoever necessary or expedient to be done in said matter; and to receive for him payments of dividends or other money due, or to become due him; to make and consent for him to any and all composition in said matter as he shall deem for his best interests; hereby granting unto my said attorney full and complete power to do and perform any and all things pertaining to said matter the same as if I were present.

In witness whereof I have hereunto signed my name this 27th day of March, 191y.

W. I. McKEE.

Signed, sealed and delivered in presence of J. W. Jones, W. R. Swift.

State of Washington,
County of King,—ss.

On this 27th day of March, 1916, before me appeared [86] W. I. McKee, to me personally known, who, being by me duly sworn, did say that he is the person named, in, and who executed the foregoing instrument and acknowledged said instrument to be his free act and deed.

[Seal] CHAUNCEY L. BAXTER,
Notary Public King County, State of Washington.

My commission expires 3/3—1918.

Q. Your attention was drawn this morning to "Exhibit No. 49," the account of the Eclipse Paint and Manufacturing Co. I think you stated that that merchandise was purchased before the giving of the chattel mortgage. A. Yes.

Q. Can you state now what was the amount that

(Testimony of W. N. Russell.)

was due at the time you filed your petition in bankruptcy? A. \$141.05.

Q. That was unpaid, was it? A. Yes, sir.

Q. That would, of course, be due, at the time that you gave the chattel mortgage then.

A. Yes, sir.

Mr. ARNOLD.—I offer in evidence “Exhibit 49.”

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court an exception was duly reserved.

Thereupon “Exhibit No. 49” was received in evidence and is in words and figures, as follows: [87]

The Eclipse Paint and Mfg. Co. Order No. a 61322, via. Pena. Salesman: Thomas. Terms 2% 30 Da. 90 Da. Net. Sold to Russell Lumber Co., Big Timber Sweet Grass Co., Mont. Route C. M. & St. P. No. Pac. Due 7—13—1915,

1 half bbl grapholastic in steel			
bbl 38½ gal	80	30	80
6 2-5 cases grapholastic 60 gal.	80	48	00
24 1 gal cans grapholastic	80	19	20
1 half bbl armorcote 390#	11	42	90
2 2-5 cases kemisoris slate	20	“1	20 24 00
12 1 gal cans kemisoris slate	1	20	14 40 179 30
Credit			38 25
			<hr/>
			141 05

In the District Court of the United States for the
 — District of ———, ——— Division.

(Testimony of W. N. Russell.)

In the matter of Russell Lumber Co., Bankrupt. In Bankruptcy. No. ——. Proof of Claim.

At Cleveland, in the County of Cuyahoga and State of Ohio, on the 31st day of March, A. D. 1916, before me, Frank H. Murphy, a Notary Public, came F. T. Jamieson, of Cleveland, in the county of Cuyahoga, and State of Ohio, and made oath, and says:

That he is treasurer of The Eclipse Point & Mfg. Co., a corporation, incorporated by and under the laws of the State of Ohio, and carrying on business at Cleveland, in the county of Cuyahoga, and State of Ohio, and that he is duly authorized to make this proof;

That he is one of the firm of ———— consisting of deponent and ———— of ————, in the County of ————, and State of ————. That he is the attorney, ————, of ————, of ————, in the County of ————, and State of ————. [88]

That the Russell Lumber Co., the person by ————, whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said deponent in the sum of one hundred forty-one and 5/100 dollars, with interest from ———— at ———— per cent per annum; that the consideration of said debt is as follows: goods and merchandise sold and delivered as per invoice attached; that no part of said debt has been paid, except—that there are no set-offs or counterclaims to the same (except———

That said claim consists of an open account——

(Testimony of W. N. Russell.)

due on ———; that no note has been received for such account, nor has any judgment been rendered thereon.

That the only securities held by ——— for said debt are the following:

That said deponent has not, nor any person by his order or to the knowledge or belief of said deponent, for his use had or received any manner of security for said debt whatever.

And this deponent further says that this deposition cannot be made by the claimant in person because ——— and that he is duly authorized by his principal to make this affidavit, and that it is within his knowledge that the aforesaid debt was incurred as and for the consideration above stated, and that such debt, to the best of his knowledge and belief, still remains unpaid and unsatisfied.

[Seal]

F. T. JAMIESON.

Subscribed and sworn to before me this 31st day
[89] of March, A. D. 1916.

F. H. MURPHY,
Notary Public.

Power of Attorney:

KNOW ALL MEN BY THESE PRESENTS,
That the undersigned, having full authority to represent the claim duly proven within, do make, constitute and appoint Frank Arnold, Attorney, of Livingston, Mont., my true and lawful attorney, for me and in my name, place and stead, to attend and vote at any and all meetings of creditors for the purpose of electing trustee or trustees, or any other pur-

(Testimony of W. N. Russell.)

pose, and generally to do and perform all and every act and thing whatsoever requisite and necessary to be done in the premises to secure my best interests, and do hereby revoke any and all other like authority heretofore given to any other person or persons.

In Witness Whereof I have hereunto signed my name and affixed my seal the 31st day of March, A. D. 1916.

[Seal]

F. T. JAMIESON,

Signed, sealed and delivered in presence of

Acknowledged before me this 31st day of March, A. D. 1916.

[Seal]

F. H. MURPHY,

Notary Public.

Q. Drawing your attention to "Exhibit No. 56," the proof of claim of Montana Coal & Iron Company, I will ask you at the time that you filed your petition in bankruptcy how much was due to the Montana Coal and Iron Company? A. \$162.92.

Q. That was unpaid at that time? [90]

A. Yes.

Q. Will you state whether or not that was for merchandise that was purchased subsequent to the giving of the chattel mortgage or before?

A. It was after.

Q. State whether or not the merchandise was received in your yard and used in the course of your business at Big Timber. A. It was.

Mr. ARNOLD.—I offer "Exhibit 56" in evidence.

Mr. CAMPBELL.—We make the same objection.

(Testimony of W. N. Russell.)

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

Whereupon "Exhibit No. 56" was received in evidence and is in words and figures as follows:

In account with Montana Coal & Iron Company, Washoe, Mont., 3-8-1916. W. N. Russell Lbr. Co. Big Timber.

		Car	Kind			
Jul.	15.	27599	NP Egg	81000#	2 15	87 08
"	31.	55662	" Lump	85200	2 40	102 24
Aug.	11.	47629	" "	81600	2 75	112 20
Sep.	23.	553772	PRR "	60000	2 75	82 50
Oct.	5.	53443	PM Egg	74400	2 00	74 40

458 42

Credit

Sep.	30.	Cash	82 50
Oct.	5.	"	200 00
	20.	Demurrage	13 00
	20.	Balance	162 92

458 42

In the District Court of the United States, for the District of Montana. In the matter of W. N. Russell doing business under the name and style of W. N. Russell Lumber Company and W. N. [91] Russell as an individual. Bankrupt. In Bankruptcy.

At Washoe, in said district of Montana, on the — day of March, A. D. 1916, came J. M. Freeman, of Washoe, in the county of Carbon, and State of

(Testimony of W. N. Russell.)

Montana and made oath and says that he is Manager of the Montana Coal & Iron Company, a corporation incorporated by and under the laws of the State of ——— and carrying on business at Washoe in the county of Carbon and State of Montana, and that he is duly authorized to make this proof, and says that the said W. N. Russell, the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still, is, justly and truly indebted to said corporation in the sum of One hundred sixty-two and 92/100 (\$162.92) dollars; that the consideration of said debt is as follows: Goods, wares and merchandise sold and delivered to said bankrupt upon open, account as per bill of items hereto attached and marked Exhibit "A," said goods, wares and merchandise being sold and delivered at the special instance and request of said debtor, together with interest from August 20, 1915. That the amount of said account is now due. That this proof is made to this affiant for the reason that he is entirely familiar with the accounts of said company at Washoe Montana, and the officers of the said company reside out of and are absent from the State of Montana. That no part of said debt has been paid; that there are no set-offs or counterclaims [92] to the same; and that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever; and that no note has been received for said

(Testimony of W. N. Russell.)

debt and no judgment recovered thereon except as herein mentioned.

J. M. FREEMAN,
Manager of said Corporation.

Subscribed and sworn to before me this 22d day of March, A. D. 1916.

[Seal]

P. J. EGAN,
Notary Public.

My commission expires 4-4-1916.

In the United States District Court; District of Montana. Power of Attorney.

In the Matter of W. N. Russell doing business under the name and style of W. N. Russell Lumber Company and W. N. Russell as an individual. Bankrupt.

KNOW ALL MEN BY THESE PRESENTS: That the undersigned Montana Coal & Iron Company, a corporation, existing under the laws of the State of ————— hereby makes, constitutes and appoints Frank Arnold, of Livingston, Montana, its true and lawful attorney, for it and in its name, to attend and vote for it at any and all meetings of creditors for the purpose of electing trustees of the estate of said bankrupt, and any and all other purposes; and generally to act for it and to perform any and all acts and things whatsoever necessary or expedient to be done in said matter; and to receive for it payments of dividends or other money due, or to [93] become due it; to make and consent for it to any and all compositions in said matter as he shall deem for its best interests; hereby granting unto our

(Testimony of W. N. Russell.)

said attorney full and complete power to do and perform any and all things pertaining to said matter the same as if it were present by its proper officers.

In witness whereof it has caused these presents to be signed in its corporate name by its manager and its corporate seal to be hereto attached by authority of its Board of Directors, this — day of March, 1916.

MONTANA COAL & IRON COMPANY,

By J. M. FREEMAN,

Manager.

Signed, sealed and delivered in presence of C. F. Allen.

State of Montana,

County of Carbon,—ss.

On this 22d day of March, 1916, before me appeared ——— to me personally known, who, being by me duly sworn, did say that he is the manager of Montana Coal & Iron Company, that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was executed in behalf of said corporation by authority of its Board of Directors; and the said ——— acknowledged said instrument to be the free act and deed of said corporation.

P. J. EGAN,

Notary Public Carbon County, State of Montana.

My Commission expires 4-4-1916. [94]

Q. Drawing your attention to "Exhibit No. 57," the Account of the Pacific Lumber Agency, I will ask you how much was due and owing on that ac-

(Testimony of W. N. Russell.)

count at the time you filed your petition in bankruptcy? A. \$460.14.

Q. That was unpaid then, was it? A. Yes.

Q. State whether or not that was for lumber purchased before or after you gave the chattel mortgage.

A. Before.

Q. Then it was a debt due at the time that you gave the chattel mortgage? A. Yes, sir.

Mr. ARNOLD.—I offer “Exhibit 57” in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

Whereupon “Exhibit No. 57” was received in evidence and is in words and figures as follows:

Pacific Lumber Agency, Reference 19772. Aberdeen, Washington, June 7th, 1915. Sold to W. N. Russell Lumber Co., Big Timber, Montana. Shipped to, same. Shipped by Pacific Lumber Agency, Routing, N. P. Prices F. O. B. 35 and 42¢ rates. Agency Order No. 5720. Salesman No. and Name Harris 8. Car. No. 47629 N. P.

21,427 ft. Lumber	500.25
102 M Extra Star A Star Red Cedar Shgls	211.14
	<hr/>
	\$711.39

[95]

June 29, 1915—Credit freight	\$251.25
Balance	\$460.14

(Testimony of W. N. Russell.)

State of Washington,

County of Grays Harbor,—ss.

A. L. Davenport, being first duly sworn upon oath, deposes and says: That he is Manager of the Pacific Lumber Agency, a corporation organized and existing under the laws of the State of Washington, having its principal place of business at Aberdeen, in said State. That the foregoing is a true and correct statement of the account of W. N. Russell Lumber Co., as the same appears on the books of said Pacific Lumber Agency; that the above mentioned sum of Four hundred sixty and 14-100 Dollars (\$460.14) represents the actual amount now due and owing the said Pacific Lumber Agency by the said W. N. Russell Lumber Co., that there are no just credits or offsets against said account, except as shown in the foregoing statement; that the said Pacific Lumber Agency holds no security for the payment of above account.

A. L. DAVENPORT.

Subscribed and sworn to before me this 17th day of March, A. D. 1916.

W. B. PAINE,

Notary Public in and for the State of Washington,
residing at Aberdeen in said State.

In the District Court of the United States, for the District of Montana. In the matter of W. N. Russell doing business under the name and style of W. N. Russell Lumber Company and W. N. Russell [96] as an individual. Bankrupt.

(Testimony of W. N. Russell.)

At Aberdeen in the State of Washington, 27th March, 1916, came A. L. Davenport of Aberdeen in the county of Grays Harbor, State of Washington and made oath as follows: That he is acting treasurer of Pacific Lumber Agency, a corporation organized and existing under and by virtue of the laws of the State of Washington and carrying on business at Aberdeen, county of Grays Harbor, State of Washington, the claimant herein.

That he is duly authorized to make this proof that the said W. N. Russell the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition and still is justly and truly indebted to said claimant in the sum of four hundred and sixty dollars and fourteen cents (\$460.14), with interest thereon at the rate of 8 per cent per annum from July 7, 1915.

The consideration of said debt is as follows: goods, wares and merchandise sold and delivered by the said claimant to said bankrupt at his special instance and request, as per itemized statement hereto attached and made a part hereof, marked exhibit "A."

That no part of said debt has been paid. That said debt became due on the 7th day of July, 1915. That there are no setoffs or counterclaims to said debt, that no note has been taken or received and no judgment has been rendered for said indebtedness [97] or any part thereof. That this affiant has not nor has the claimant on whose behalf this proof is made, nor any person on behalf of them or any or either of them, to this affiant's knowledge or belief,

(Testimony of W. N. Russell.)

had or received any manner of security for said debt or any part thereof.

A. L. DAVENPORT,
Acting Treasurer.

Subscribed and sworn to before me this 27th day of March, 1916.

[Seal]

W. B. PAINE,
Notary Public, State of Washington.

My commission expires 8th day of April, A. D. 1919.

In the District Court of the United States for the District of Montana. Power of Attorney.

In the matter of W. N. Russell doing business under the name and style of W. N. Russell Lumber Company and W. N. Russell as an individual. Bankrupt.

KNOW ALL MEN BY THESE PRESENTS: That the undersigned, claimant herein, does hereby make, constitute and appoint Frank Arnold of Livingston, State of Montana our true and lawful attorney, for us and in our name and place to attend and vote at any and all meetings of creditors, in bankruptcy or otherwise for the purpose of electing a trustee or for any other purpose; to attend and act at all sittings of Court, to accept in writing any proposition of compromise submitted; to receive payment of dividends or moneys due under composition and receipt therefor; and generally to do and [98] perform all and every act and thing whatsoever, requisite and necessary to be done in the premises, with as full powers as the undersigned would have if

(Testimony of W. N. Russell.)

in each case present. Full power of substitution is hereby granted and any and all other like authority hereto given is hereby revoked.

The referee is hereby directed to send to you all necessary notices.

In the presence of A. L. Davenport,

PACIFIC LUMBER AGENCY,

By E. HULBERT,

President.

State of Washington,

County of Grays Harbor,

On this 27th day of March 1916, before me personally appeared E. Hulbert, to me personally known, who being duly sworn did depose and say that he is President of the Pacific Lumber Agency, a corporation, the claimant herein; that he executed the foregoing power of attorney on behalf of said claimant and that he is duly authorized and empowered so to do.

[Notarial Seal]

E. H. TANNER,

Notary Public for the State of Washington. Residing at Aberdeen, Washington.

My commission expires Jan. 1918.

Q. Drawing your attention to "Exhibit No. 58," the proof of claim of the Standard Paint Co. State what the amount due and owing to those people was at the time you filed your petition in bankruptcy.

A. \$177.93.

Q. Was that for merchandise purchased before or after [99] the giving of the chattel mortgage to the bank. A. It was after.

(Testimony of W. N. Russell.)

Q. Can you give the date of it? A. 11-24-1915.

Q. Was that merchandise that was received and used in the regular course of your business at Big Timber? A. Yes, sir.

Mr. ARNOLD.—I offer “Exhibit 58” in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objections will be overruled.

To which ruling of the Court, an exception was duly reserved.

Whereupon “Exhibit No. 58” was received in evidence and is in words and figures as follows:

New York, 11-24-15. No. Chi 3592. W. N. Russell Lumber Company, Big Timber, Mont. The Standard Paint Company, General Offices: Woolworth Building, New York. Terms 30 days dating 2% 30 days 60 days net F. O. B. Livingston.

25 100 squares rolls #7 SPC waterproof felt

2 33 58 25

30 30 “ 1 ply imp roofing

1 19 35 70

20 20 2 “ imp roofing

1 47 29 40

20 20 3 “ imp roofing

1 75 35 00

30 30 2 “ rubberoid roofing

2 32 69 60 227 95

freight 50 02

Duplicate 177 93

Marks Shipped from C H via with chi-3893.

Monthly Statement.

(Testimony of W. N. Russell.)

New York, Feb. 17, 1916. W. N. Russell Lbr. Co.
[100] Big Timber, Montana. To the Standard
Paint Company, Dr. Woolworth Building.

Nov. 24 to Mdse 30 da. @2/60 227 95

Cr. Dec. 20, By freight 50 02 \$177 93

In the District Court of the United States, for the District of Montana. In the Matter of W. N. Russell, doing business under the name and style of W. N. Russell Lumber Company, and W. N. Russell as an individual. Bankrupt. In Bankruptcy.

At New York, in the State of New York, on the 4th day of April, A. D. 1916, came Felix Jellenik, of New York, in the County of New York, and State of New York, and made oath and says that he is Treasurer of the Standard Paint Company, a corporation incorporated by and under the laws of the State of New Jersey, and carrying on business at New York, in the county of New York, and State of New York, and that he is duly authorized to make this proof, and says that the said W. N. Russell, the person against whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of said petition, and still is, justly and truly indebted to said corporation in the sum of One Hundred Seventy-seven and 93/100 (\$177.93) Dollars. That the consideration of said debt is as follows: Goods, wares and merchandise sold and delivered to said bankrupt upon open account as per bill of items hereto attached and marked Exhibit "A," said goods, wares and merchandise being sold and

(Testimony of W. N. Russell.)

delivered at the special instance and request of [101] said debtor, together with interest from the 24th of December, 1915. That the amount of said account is now due. That no part of said debt has been paid. That there are no set-offs or counter-claims to the same. And that said corporation has not, nor has any person by its order, or to the knowledge or belief of said deponent, for its use, had or received any manner of security for said debt whatever; and that no note has been received for said debt and no judgment recovered thereon except as herein mentioned.

FELIX JELLENIK,
Treasurer of Said Corporation.

Subscribed and sworn to before me this 4th day of April, A. D. 1916.

A. E. HASKINS,
Notary Public, Kings County.

Certificate filed in New York County. New York Register's Office.

In the District Court of the United States, District of Montana. Power of Attorney.

In the Matter of W. N. Russell, doing business under the name and style of W. N. Russell Lumber Company, and W. N. Russell as an individual. Bankrupt.

KNOW ALL MEN BY THESE PRESENTS, that the undersigned, Standard Paint Company, a corporation existing under the laws of the State of ———, hereby makes, constitutes and appoints Frank Arnold, of Livingston, Montana, its true and lawful

(Testimony of W. N. Russell.)

attorney, for it and in its name, to attend and vote for it at any and all meetings of creditors for the purpose [102] of electing trustees of the estate of said bankrupt, and any and all other purposes; and generally to act for it and to perform any and all acts and things whatsoever necessary or expedient to be done in said matter; and to receive for it payments of dividends or other money due, or to become due it; to make and consent for it to any and all compositions in said matter as he shall deem for its best interests; hereby granting unto our said attorney full and complete power to do and perform any and all things pertaining to said matter the same as if it were present by its proper officers.

In Witness Whereof, it has caused these presents to be signed in its corporate name by its president and its corporate seal to be hereto attached by authority of its Board of Directors, this — day of —, 19—.

STANDARD PAINT COMPANY,

By _____,
President.

Signed, sealed and delivered in presence of
_____.

State of New York,
County of New York,—ss.

On this — day of March, 1916, before me appeared _____, to me personally known, who, being by me duly sworn, did say that he is the president of Standard Paint Company; that the seal

(Testimony of W. N. Russell.)

affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was executed in behalf of said corporation by authority of its Board of Directors; and the said _____ acknowledged said instrument to be the free act and deed [103] of said corporation.

Notary Public New York County, State of New York.

My commission expires —, 19—.

Q. Drawing your attention to "Exhibit No. 59," the claim of the Lindstrom Handforth Lumber Co., I will ask you the amount that was due to those people and owing at the time that you filed the petition in bankruptcy. A. \$151.35.

Q. Now, state whether that was for merchandise before or after the giving of the chattel mortgage?

A. Before.

Q. Were there any payments made to the Lindstrom Handforth people subsequent to the giving of the chattel mortgage? A. Yes, sir.

Q. Do you know how they were paid?

A. I believe through the collecting agency, or collectors.

Q. State whether or not those were the checks that were introduced in evidence this morning, through some attorneys—Fletcher and some other name.

A. I think so.

Q. How much was paid?

A. February 24, freight bill \$249.20. July 7, cash on account \$100. August 7, cash on account \$50.00.

(Testimony of W. N. Russell.)

Q. State whether or not in addition to the \$151.35 there would be \$150 that you paid in cash due and owing to those people when the chattel mortgage [104] was given? A. There was.

Mr. ARNOLD.—I introduce “Exhibit 59” in evidence.

Mr. CAMPBELL.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

Whereupon “Exhibit No. 59” was received in evidence, and is in words and figures as follows:

Tacoma, Wash., March 15, 1916.

W. N. Russell, Big Timber, Mont., In account with
Lindstrom-Handforth Lumber Co.,

Oct. 8, 1914, Lumber car 41372	550	55
Feb. 24, 1915, 41372 E/B 249	20	
Jul. 7, Cash on account	100	00
Aug. 11, “	50	00
	<hr/>	<hr/>
		399 20
		<hr/>
		151 35

In the District Court of the United States, for the Montana District. In the Matter of W. N. Russell Lumber Company, and W. N. Russell, Bankrupt.

No. —, Proof of Claim (Corporation). In Bankruptcy.

At —, in said District of —, on the 14th day of March, A. D. 1916, came T. J. Handforth, of Tacoma, in the County of Pierce, and State of Washington, and made oath, and says that he is the Secretary-Treasurer of the Lindstrom-Handforth Lumber

(Testimony of W. N. Russell.)

Co., a corporation, incorporated by and under the laws of the State of Washington, and carrying on business at Tacoma, in the county of Pierce, and State of Washington, and that he is duly authorized [105] to make this proof, and says that the said bankrupt, the person by (or against) whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition and still is, justly and truly indebted to said corporation in the sum of One Hundred Fifty-one and 75/100 (151.75) Dollars; that the consideration of said debt is as follows: goods, wares and merchandise, consisting principally of lumber and building materials, a bill of items of which said account is hereto annexed, that no part of said debt has been paid; that there are no set-offs or counterclaims to the same; that no judgment has ever been recovered thereon; and that said corporation has not, nor has any person by its order, or to the knowledge or belief, of said deponent, for its use, had or received any manner of security for said debt whatever.

T. J. HANDFORTH,
Treasurer of Said Corporation.

Subscribed and sworn to before me this 14th day of March, A. D. 1916.

[Seal]

JOHN D. FLETCHER,
Notary Public, in and for the State of Washington.
Residing at Tacoma, in said State.

(Testimony of W. N. Russell.)

LETTER OF ATTORNEY.

To Charles W. Campbell:

The Undersigned, Lindstrom-Handforth Lumber Co., a corporation organized and existing under the laws of the State of Washington, and having an office and place of [106] business of the city of Tacoma, county of Pierce, State of Washington, does hereby authorize you or any one of you to attend the meeting or meetings of creditors of the bankrupt aforesaid, at a Court of Bankruptcy wherever advertised or directed to be holden, on the day and at the hour appointed and notified by the Court for holding such meeting or meetings, or at which such meeting or meetings, or any adjournment or adjournments thereof may be held, and then and there from time to time, and as often as there may be occasion, for it and in its name to vote for or against any proposal or resolution that may be then submitted under the Acts of Congress relating to bankruptcy, and in the choice of trustee or trustees of the estate of said bankrupt, and for it to assent to the appointment of such trustee or trustees; with like power to attend and vote at any other meeting or meetings of creditors, or sitting or sittings of the Court, which may be held therein for any of the purposes aforesaid; also to accept any composition proposed by said bankrupt in satisfaction of his debts, and to receive payment of dividends and of money due it under any composition, and for any other purpose whatsoever in its interest, with full power of substitution and revocation.

(Testimony of W. N. Russell.)

In Witness Whereof, the said corporation has caused these presents to be executed by its Treasurer, T. J. Handforth, duly authorized thereto, the fourteenth day of March, A. D. 1916. [107]

LINDSTROM HANDFORTH LUMBER
CO.,

By T. J. HANDFORTH,

Secretary-Treasurer of Said Corporation.

Signed, sealed and delivered in the presence of

State of Washington,
County of Pierce,—ss.

On this fourteenth day of March, 1916, before me personally appeared T. J. Handforth to me known to be the Treasurer of the corporation that executed the foregoing Letter of Attorney, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, and on oath stated that he was authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal]

JOHN D. FLETCHER,

Notary Public in and for the State of Washington,
Residing at Tacoma, in Said County.

Q. Drawing your attention to "Exhibit No. 60," the claim of M. C. Henderson, I'll ask you who M. C. Henderson is, Mr. Russell.

(Testimony of W. N. Russell.)

A. Either the bookkeeper or member of the—I believe this man represented an oil company.

Q. Where was the oil used?

A. Very little that I know of in this case.

Q. Now, Mr. Russell, you stated yesterday that in keeping your account with the bank, your deposit account, that everything you had in the way of [108] cash you deposited in the bank—is that correct?

A. Everything; practically; the greater portion naturally went to the bank and was checked out from there.

Q. Did you keep anything in your store or office?

A. I always kept from ten to twenty-five dollars to make change with.

Q. That was the extent of it, was it?

A. Yes, sir.

Q. You also state, Mr. Russell, that you deposited in the bank not only the moneys arising from your business of retailing and selling lumber, but the proceeds of the ranch.

A. Yes, sir.

Q. That is, the property you got off the ranch?

A. Yes, sir.

Q. Is it or is it not true that you also paid out of it, this account you kept in the bank, any expenses incident to the running of the ranch that you were obligated to pay?

A. Well, I cannot say as there is anything paid out there for running the ranch, anyhow there is no amount seemingly large enough to call for a check for running the ranch. The fact that my brother was

(Testimony of W. N. Russell.)

there practically kept the ranch running.

Q. Now, then, subsequent then to June 29, 1915, and until the time you filed your petition, can you give an idea as close as you can as to what was received from the ranch and placed into the bank at different times,—not separately but in the aggregate? [109] A. Well, I couldn't give—

Q. Your best judgment.

A. —a good account of it. From hogs and horses and cows and such things as that I expect probably two hundred or two hundred and fifty dollars.

Q. Now, then, your crop on that ranch failed in the year 1913, didn't it?

A. So far as marketing anything; yes.

Q. The rest of it was used for—

A. Received some money out of it, feeding stock and feeding up some stock for our home, that we sold.

Q. Now, you paid all your labor and other current expenses through the bank, did you? A. Yes.

Q. Who did you have working for you?

A. Who did I have working for me?

Q. Who were the men working for you subsequent to the giving of this chattel mortgage?

A. Jake Vork and Jake Pleggerman.

Q. Just the two men? A. Yes, sir.

Q. What wages did they each receive?

A. One of them received \$80 and the other one worked up to that.

Q. You kept no—

A. In regard to the ranch, the money that came

(Testimony of W. N. Russell.)

from that I got just a—about January or February I sold two horses, they were used back and forth [110] between the ranch and yard there, worth about \$250 alone, outside of other—

Q. Whose horses were those? A. My own.

Q. What did you do with the money you received from those horses.

A. It went into the general pot in the lumber yard.

Q. Was the money deposited in the bank?

A. Yes, sir.

Q. Do you remember the date of it?

A. No, I do not.

Q. Do you remember particularly who it was paid out to? A. No, I do not know that.

Q. Now, then, you stated also that you received some money for teaming. A. Yes, sir.

Q. Have you any idea, approximately how much that was—I understand that you kept no account of it at all—is that correct? A. Yes, sir.

Q. It was just kept in the same way your other business was kept? A. Yes, sir.

Q. Have you any idea how much the money received from teaming amounted to?

A. No; it would be awfully hard to try to say what it would amount to.

Q. Could you give any approximate idea of what [111] it was, subsequent to the giving of the chattel mortgage?

A. During what time do you want that estimated?

Q. Subsequent to the time of the giving of the chattel mortgage until you filed the petition.

(Testimony of W. N. Russell.)

A. From the time that was given to the filing of the petition, up from July 29th until the filing of the petition?

A. That was possibly about nine months, wasn't it?

Q. No—I think I can give you the date that I filed the—the petition was filed on the 21st day of February and adjudicated on the 17th. Then between June 29, 1915, the date of the filing of the petition, and February 21, 1916.

A. Well, I imagine I would have taken in from two hundred to two hundred and fifty dollars any how, off of my team work.

Q. How many teams did you have in the lumber yard? A. I kept one team for the yard.

Q. Now, then, some of this work was done by other teams that you got from the ranch?

A. Very nearly all of it.

Q. By teams that you got from the ranch?

A. Well, I had one team for quite a while—my father's.

Q. Yes.

A. That cost me, I think, I got the use of them while I kept them—and there was a team from the ranch I had at different times. [112]

Q. And those were the teams that you hired out and got this \$200 or \$250 for? A. Yes.

Q. And you had, of course, to keep these teams and care for them.

A. I think not, that. Over and above their feed.

Q. You think that.

(Testimony of W. N. Russell.)

A. Yes, the cost of the team \$1.50 a day about, and they would bring in about \$3 a day. The team was working all day, which brings you about a dollar and a half a day net.

Q. Now, referring to these checks this morning, put in evidence this morning, all these checks were in your handwriting, signed by you, those checks put in evidence this morning?

A. All signed by me and with very few exceptions drawn up by myself.

That is all.

Examination by Mr. CAMPBELL.

Q. When did you first engage in the lumber business in Big Timber? A. 1913, I think.

Q. Were you continuously in the lumber business, then, from 1913 up to the time that petition was filed? A. Yes, sir.

Q. What bank, if any, did you do business at, with, during the time you were in the lumber business?

A. Citizens State Bank until the Scandinavian American Bank was organized; for probably 10 or 15 [113] days after it started business I began with them. Continued with them until the petition was filed.

Q. And in what month and year did you commence with the Scandianvian American Bank

A. I do not remember. It was when they—10 or 15 days after they began business—that the bank was open for business.

Q. You kept your account there? A. Yes.

(Testimony of W. N. Russell.)

Q. And did you borrow any money from the bank, at any time?

A. It seems to me that I borrowed money from them when I started with them. It seemed they took up notes from the Citizens State Bank.

Q. About what amount of money did you have borrowed from the bank just prior to June 29, 1915?

A. I think within three hundred dollars of the \$4,162—was it? or \$4,165, the amount the one note called for.

Q. Was that or any part of that money secured at all?

A. Yes, there was a former mortgage.

Q. What kind of mortgage?

A. Covering these other notes—total. Chattel.

Q. And on what was that chattel mortgage?

Mr. ARNOLD.—Just a moment, that is objected to on the ground that the chattel mortgage itself would be the best evidence. It's immaterial and irrelevant for the reason that whatever the other security was, it [114] was cared for and covered by the new note and the new security that was given under date of June 20, 1915. I've no objection to the showing that the \$4,165 was a renewal of old notes. But I object to any showing being made that it was an attempt to renew old securities because then we'll have to go into the validity of the old security if you're going to do that.

The COURT.—Objection sustained for this reason, that the testimony now is that that is the first transaction he has had with the new bank, the Scan-

(Testimony of W. N. Russell.)

dinavian American Bank. That he loaned money from this bank to take up mortgages given to another bank. And I do not think that is material.

To which ruling of the Court an exception was duly reserved.

Q. What did you do with the money which was borrowed from the Scandinavian American Bank prior to June 29, 1915?

Mr. ARNOLD.—That is objected to on the ground that it is incompetent, irrelevant and immaterial. That is absolutely outside of the question of the validity of this chattel mortgage.

The COURT.—The objection will be sustained.

To which ruling of the Court, an exception was duly reserved.

Q. How much money did you get in cash or credit [115] to your individual bank account when the loan of \$4,165 was made? A. I think about \$300.

Q. And what was the rest of the loan for?

A. Securing, or practically a renewal of an old mortgage. Notes.

Q. The \$3,865? A. Yes, sir.

Q. At the time you negotiated this loan, or rather an additional loan of \$300 to make up the \$4,165, did you tell the bank at that time, or its officers, the amount of money which you was owing to creditors on account of the lumber business?

A. No; it seemed to me that I told Mr. Moe at that time that I needed a little additional money to pay off the lumber concern which was crowding me, and that about \$300 would cover. I do not know

(Testimony of W. N. Russell.)

whether there was anything said about the rest of them.

Q. Then the bank or its officers did not know at that time that you had creditors in the—in excess of what you then did owe at the bank and that the \$300 was necessary to take up the claims outstanding against you at that time?

Mr. ARNOLD.—That is objected to on the ground that it is incompetent and immaterial, and also hearsay. Its not for Mr. Russell to state what the bank knew, he can state what he told the bank and its officers. The bank and its officers might have acquired [116] outside knowledge. He cannot say what the bank knew.

Mr. CAMPBELL.—Q. As far as you know.

Mr. ARNOLD.—That is objected to on the same ground, he is not supposed to know what the bank knew, the bank and its officers—read the question.

The question was read.

Mr. ARNOLD.—I object to it on the ground that it is incompetent, hearsay and calling for the conclusion of the witness.

The COURT.—Objectionable as calling for the conclusion of the witness; but you might—

Mr. ARNOLD.—If you'll just bear with me a moment, I will say that the bank, its officers can state what they knew, but for him to state what they did not know or did know, it is absolutely incompetent.

The COURT.—The objection is sustained on the ground of calling for a conclusion of the witness.

(Testimony of W. N. Russell.)

To which ruling of the Court an exception was duly reserved.

Q. What conversation did you have with the officers of the bank at the time you negotiated the loan for \$4,165?

A. I told him—Mr. Moe, and I don't know but I think Mr. Loving also, that I needed \$300 to pay a claim against me that was crowding me. I told them of no other but the one that was crowding and [117] that was all that I know of that was said about the claims.

Q. You did not tell them, then, that at that time that you had other obligations in excess of \$300 which was owing or due? A. No, sir.

Q. Then, so far as any representations which you made to the bank with which to procure the loan for \$4,165, the officers of the bank did not know of any other obligations which you had?

Mr. ARNOLD.—That is objected to on the ground that it calls for the conclusion of the witness. He can state what he stated to the officers of the bank, what representations he made, but he cannot state what they knew from the representations he made.

The question was read to the Court.

Mr. ARNOLD.—I object to that question as calling for the conclusion of the witness. What they knew from what he stated they must state, not he.

The COURT.—Answer the question. I think he answered it before. The objection is overruled.

To which ruling of the Court an exception was duly reserved.

(Testimony of W. N. Russell.)

A. No.

Q. What did you do with the \$300 that you received and was advanced to you at that time?

A. I paid lumber account with it [118]

Q. Have you any idea what your stock of merchandise would invoice at *at* the time the mortgage was made?

A. I think it would run about \$8,000 then for stock and real estate.

Mr. ARNOLD.—I move to strike out the answer on the ground that it is not responsive to the question.

The COURT.—Strike it out.

Q. Have you any idea what your stock of merchandise was—would invoice at *at* the time this mortgage was made? A. About \$6,000.

Q. And have you any idea what the value of your real estate was at that time? A. \$2,000.

Q. Did you make any representations to the bank or its officers at the time you procured this loan and and gave the two mortgages as to the value of your real estate and of the stock of merchandise which you then had on hand

Mr. ARNOLD.—That is objected to on the ground that it calls for the conclusion of the witness; and it is indefinite with reference to the word representation. He can ask what the conversation was in regard to it, but different men may have different ideas as to what the word “misrepresentation” was.

The COURT.—The objection is overruled. [119]

(Testimony of W. N. Russell.)

To which ruling of the Court an exception was duly reserved.

A. Yes.

Q. What did you tell them as to the value of the real estate and stock of merchandise at that time?

A. I told them that it run about \$8,000.

Q. During the time that this mortgage for \$4,165 where did you keep your bank account?

A. At the Scandinavian American Bank.

Q. And was that account kept in your individual name? A. It was; yes, sir.

Q. Did you deposit in that account the proceeds from the sales made in the course of and conduct of your business? A. I did.

Q. And did you deposit also all money from collections made where credit was extended?

A. Yes, sir.

Q. Did you deposit all of the moneys which you received in the course of your business, cash or credit sales with the bank? A. Yes, sir.

Q. Did you ever deposit any money in the bank to the credit of the bank—do you understand the question?

A. No; I don't know whether you mean deposited to the credit of the bank, payment on interest or anything of the kind or what it was.

Q. No, I'll put the question in a different way. [120] Did all the moneys which you received in the course of your business from cash or credit sales, was it put in the bank to your individual account or was it in the account of the bank?

(Testimony of W. N. Russell.)

A. My individual account.

Q. Did you deposit to the credit of your individual account all the moneys which you received in the course of your business with cash or credit sales?

A. Yes, there would be very little exceptions.

Q. What were those exceptions?

A. A bill of five dollars or less, oftentimes paid out in cash from cash received, but the greater portion of this money was turned in to the bank to be checked out. Any money received, though, went back into the business.

Q. What were those small sums paid out for?

A. Well, living expenses; there was small sums paid out right along for those. And now and then a hired man probably worked a day or two days. And such things as that.

Q. Were all these sums paid out necessary incidentals of the business and of your living expenses?

A. Yes, sir.

Q. Did you at any time between the 29th of June, 1915, and the time when the petition in bankruptcy was filed, have any profits from this business in excess of your necessary living expenses and then the expenses incident to the running of your business
[121]

A. No, I didn't have enough to run the business.

Q. Then, you did not have at any time during the continuance of the lien—of this mortgage, any moneys which you could apply on your notes to the bank? A. I did not.

Q. Did you at any time during the continuance of

(Testimony of W. N. Russell.)

this mortgage tell the cashier or any other officer of the bank that fact? A. Yes, sir.

Q. When and how many times, if you know?

A. Well, at least twice a month. They would generally ask me when I was making deposits. Of course I generally had a place for it, a bill to be paid, when the money was deposited.

Q. You made verbal representations then to the bank, or its officers, at least twice a month?

A. Yes; at least that.

Q. Weren't there several times also when you were in the bank, and oftener than twice a month, when you made verbal reports of the status of your business?

Mr. ARNOLD.—That is objected to on the ground that it's suggestive; the witness has already stated he was there at least twice a month. This question is suggestive.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

A. Yes, sir. [122]

Q. Did you tell them at any time the exact amount of money that you were owing prior to the first day of February, 1916?

A. No; I do not really believe I ever run the entire indebtedness up together myself. For myself.

Q. Then you did not know yourself how much you were in debt? A. Not to a cent.

Q. As a matter of fact, under the system of book-keeping or accounting which you had there, was it

(Testimony of W. N. Russell.)

possible for you to have made better accounts to the bank from what you did? A. No, sir.

Q. Did you ever turn any money into the bank you'd applied on your \$4,165 note? A. No, sir.

Q. Did you on any other notes after that?

A. Yes, sir.

Q. What was that?

A. As I remember it, one note secured by an automobile and another one without security that I asked for for a week or two weeks, offering a man's account, if they wanted to take it up, for a car of coal.

Q. That was to keep up your stock?

A. Yes, sir.

Q. And to keep the business going.

A. Yes, sir.

Q. Did the Scandinavian American Bank ever give you any money which was not used by you in taking [123] care of the running expenses of your business and to keep up the stock in trade?

A. No.

Q. Did the bank or any of its officers give you permission or authority at any time other than what was given to you in the mortgage, to sell goods on credit?

A. No.

Q. Did you ask them for any such permission or authority. A. I do not think I did.

Q. None of the officers of the bank even ever gave you permission to extend credit for more than 30 days? A. No; not that I know of.

Q. Did you ever get any permission from the bank or any of its officers to buy materials, supplies and

(Testimony of W. N. Russell.)

merchandise from wholesalers and jobbers, on credit?

A. No; I never asked them whether I could or whether I could not.

Q. You never conferred with them about that end of the business at all? A. No, sir.

Q. Now, you stated on direct examination that some of the money which you received in the course of your business and which was deposited to your individual account in the Scandinavian American Bank, came from team work and from your ranch. Now, is there any other source from which you derived [124] moneys during the pendency of this loan—this mortgage?

A. No, I do not think there was.

Q. You were conducting a lumber business in Springdale, were you not? A. Yes, sir.

Q. Didn't you get any money from—any revenue from that business?

A. Yes. Yes, I considered that lumber business the same as my lumber business in Big Timber.

Q. What did you do with the moneys that were derived from the sales at Springdale?

A. They went into my business at Big Timber, along with the Big Timber money. I also sold lumber that I collected freight money on, to Lake Basin. Some of the team work that I did brought in money that way, hauling lumber into the Lake Basin County.

Q. Did you derive any profits from those sales other than from the team work? A. Yes, sir.

(Testimony of W. N. Russell.)

Q. And where did that money go?

A. That money went right into the bank. Also in those instances, the money derived from my teams went into the bank the same as the lumber money.

Q. What do you mean when you say "Went into the bank?"

A. I put it into my credit there.

Q. Your individual account?

A. Yes, sir. [125]

Q. Who was the beneficiary in the life insurance policy which you were carrying? A. My wife.

Q. That policy was not also made payable to your estate?

Mr. ARNOLD.—That is objected to on the ground that it is incompetent, immaterial. What has his life insurance policy got to do with the validity of the mortgage?

Mr. CAMPBELL.—It was brought out on direct examination it had been payable to the estate it would have went to the benefit of the trustee and creditors.

The COURT.—Answer the question. Overruled.

To which ruling of the Court, an exception was duly reserved.

A. It was not.

Q. Just your wife alone? A. Yes, sir.

Q. Now, in regard to "Exhibit No. 18," which was a check for \$25, made August 12, and given to Joe Meister, you testified that that was in payment or at least part payment, for the mare. Was that mare used by you in your lumber business?

(Testimony of W. N. Russell.)

A. She was. She was used in the same place that one of the horses I have to-day was used. After buying the mare I exchanged twice—once again and got a horse that matched the one that I was already driving, making a more valuable team.

Q. What was that team used for? [126]

A. For drayage of lumber and coal almost altogether, to and from the yard.

Q. Now, in regard to Exhibit No. 21, which was a check for \$55, given October 5, to H. Utermohle, you testified that that was a part payment on lots. What lots was that check given in payment for?

A. The two that I kept my rough lumber, shingles and lath on. Also had my horse barn on those two lots.

Q. Were those lots necessary to the carrying on of your business?

A. Yes. There was not enough room for the business on two lots.

Q. Now, "Exhibit 24" was also a check to H. Utermohle and was a balance due on lots, that was the same lots?

A. Yes, sir. That finished up for the lots.

Q. These are lots 11 and 12 in—

A. In block 16.

Q. Now, in regard to "Exhibit No. 25," which was a check for \$52.49, given to the Scandinavian American Bank, you testified that it was part payment of a note given for an automobile. That automobile used by you in conducting your lumber and coal business? A. Yes, sir; it was.

(Testimony of W. N. Russell.)

Q. In regard to "Exhibit No. 31," check—which was a check for \$15 given to the Oliver Typewriter concern. Was that typewriter used in the course of your business? [127] A. It was.

Q. And several of your creditors which you were owing for materials and supplies purchased by you, you gave notes, did you not? A. I did.

Q. Did you tell the bank or any of the officers of the bank that you were giving those notes?

A. No.

Q. You testified on direct examination that you estimated that you took in \$250 from the ranch. That estimate is not accurate, is it?

A. Its not, no. Its only a guess. I think if anything I took in more money.

Q. And the \$250 which was taken in for team work was also a guess, was it not? A. Yes; it was.

Q. Was there ever at any time during the business that you carried on there in Big Timber and particularly from about the 29th of June until your petition was filed, any agreement or conversation to the effect that you would give a mortgage on your stock of goods and your real estate for the purpose of beating other creditors or making the Scandinavian American Bank a preferred creditor to the rest?

Mr. ARNOLD.—Just a moment—that is objected to on the ground that it calls for the conclusion of the witness, and on the ground that its a question for the Court from the facts in the case as to whether the

(Testimony of W. N. Russell.)

creditors [128] were hindered, delayed or defrauded.

The COURT.—If this is for the purpose of laying the foundation for an impeachment, it would hardly be proper cross-examination. The objection will be overruled, answer the question.

Mr. ARNOLD.—I object to it further, if the Court please, on the ground that it is not proper cross-examination.

The question was read to the Court.

Mr. ARNOLD.—That is objected to on the ground that it is incompetent and immaterial in so far as it refers to a time subsequent to the 29th day of June, when this mortgage was given, and for the further reason that it is incompetent and immaterial because the statute does not in any shape or manner prohibit or refer to a man beating his creditors, and there is nothing in the statute about beating the creditors; and for the further reason that there is not anything in the statute that prevents a man giving one creditor a preference over another. You got a right to prefer one creditor over another and that is what was done in this case, a preference. The provision of the statute is against hindering, delaying or defrauding the creditors. The question does not come to that issue at all. [129]

Mr. CAMPBELL.—The objectors here have introduced in evidence a whole raft of checks and claims and—

The COURT.—Well, in the first place if he answered that question in the affirmative, that there

(Testimony of W. N. Russell.)

was such an agreement, it would be detrimental to you more than to the other. The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

A. No, sir; there was no such agreement made.

Q. Was there any conversation about beating them? A. No, sir.

That is all.

Redirect Examination.

(By Mr. ARNOLD.)

Q. Now, Mr. Russell, what did you understand by Mr. Campbell's question as to whether you made any agreement or had any conversation whereby you were to beat, as Mr. Campbell phrases it, your creditors. What did you understand him to mean by that when you answered the question "No"? What did you understand by the question in which Mr. Campbell uses the word "beat"?

A. I understood that he wanted to know if that agreement or mortgage was drawn up to beat somebody.

Q. What do you mean by "beat"? What did you understand him to mean?

A. Why, to do somebody else out of money. To [130] take money that belonged to somebody else.

Q. That's what you understood him to mean?

A. Yes, sir.

Q. That mortgage was drawn up to secure the Scandinavian American Bank, wasn't it?

A. To secure them?

(Testimony of W. N. Russell.)

Q. Yes.

A. Yes; for money that I had got from them.

Q. In the past? A. Yes, sir.

Q. Insofar as it was drawn up then, it was a preference over other creditors, wasn't it—what?

Mr. MILLER.—That is objected to as not proper re-direct examination, and calling for a conclusion of the witness, a conclusion of law.

The COURT.—The objection will be sustained.

The last question was read.

Mr. MILLER.—The question is asking for a conclusion. What is a preference is a question of law, absolutely, in bankruptcy courts.

The COURT.—There is no other way of arguing that.

Mr. ARNOLD.—Your objection to the question then is that it calls for a conclusion of law?

Mr. MILLER.—Well, that's right.

The COURT.—The objection will be sustained as calling for the conclusion of the witness.

To which ruling of the Court, an exception was duly reserved.

Q. Now, [131] what did you understand Mr. Campbell to mean then when he asked you about whether you intended to give the Scandinavian American Bank a preference?

A. Why, he meant that—did I mean to give them a preference over the other creditors of course.

Q. Well, that was understood when you executed that mortgage to the Scandinavian American Bank

(Testimony of W. N. Russell.)

that you'd prefer them to the other creditors, wasn't it? A. Well, no.

Q. Wasn't that the purpose of giving the mortgage to them?

A. The idea of giving them the mortgage was to get the money.

Q. Well, but you had the money then—didn't you, Mr. Russell?

A. The idea was to keep it, to keep using it. Supposing I'd been unable to get the money, the creditors would have thrown the business out. Had I been able to continue running, no creditor or no man would have lost a cent.

Q. But as a matter of fact the giving of that mortgage gave the Scandinavian American Bank security that other creditors did not have, didn't it?

A. Well, I don't know what it gave them but it gave me the means to keep going. That is what I was paying attention to.

Q. But it gave them security that others did not have, didn't it? [132] A. Well—

Q. (Interrupting.) Well, but you can answer the question yes or no. Didn't it give them security that the other creditors did not have?

A. Well, that would naturally be up to them—

Q. (Interrupting.) You can say yes or no to that question. You hadn't secured other creditors, had you? A. Yes.

Q. What others?

A. Those that have the notes—had the mortgages.

Q. What other creditors had mortgages?

(Testimony of W. N. Russell.)

A. Why, chiefly the firm that had the crop mortgage, the Eureka people.

Q. That was the only one?

A. Yes. That is the only one that had a mortgage.

Q. Now, at the time you gave this mortgage, Mr. Russell, you stated there was no agreement to beat your other creditors—that is correct, isn't it?

A. Yes.

Q. But the understanding that you had with Mr. Moe was that you needn't pay any attention to the provision of the mortgage and you could go on doing business as you had in the past, wasn't that it?

A. No, sir.

Q. What did Mr. Moe say to you with reference to the provisions of that chattel mortgage, rendering an account each month? [133]

A. He said that they would call for them as they wanted them, which they did, every few days when I was turning in my money.

Q. He told you you need not make a monthly statement? A. No.

Q. Didn't Mr. Moe tell you you needn't make an accounting each month? A. No.

Q. They would call for it when they wanted it?

A. He said they would call for it when they wanted it.

Q. As a matter of fact you never did make any monthly accounting, did you?

A. I made it weekly.

Q. Those accounts weren't written accountings—

(Testimony of W. N. Russell.)

were they? A. No, not written.

Q. They were not based on any statement that you drew from your books of any actual summing up of your assets and liabilities?

A. Why, not that I took two or three days to run up for them a statement of that account, no; but I knew all the time close enough to suit any man where I was at.

Q. And when you made him these statements you did not tender to him any balance of cash or money that you might have had on hand at the time—did you? A. I never did have that. [134]

Q. You had a balance on hand from time to time, didn't you?

A. There might have been a balance, but it did not lay there and go to waste at all, there was always 10 or 15 places to put that money.

Q. And it was drawn out, was it not, Mr. Russell, a great part of it, or a considerable part of it, to pay creditors that consisted at the time the chattel mortgage was given?

A. Why, yes; it was drawn at the time to pay all the bills necessary to be paid to keep the business running.

Q. That was the idea with you and Mr. Moe, was it not? To keep the business running and pacify the creditors as easily as possible?

A. My idea was certainly to keep it running.

Q. Wasn't that Mr. Moe's—

MR. MOE.—(Interrupting.) I think I—

MR. ARNOLD.—You— When I want to ask you

(Testimony of W. N. Russell.)

something I'll put you on the stand and—

The WITNESS.—You'll have to ask Mr. Moe for that.

Mr. MILLER.—We object to that as—

Mr. ARNOLD.—I ask that Mr. Moe be instructed not to interpolate or anything of that kind, unless he's asked something.

Mr. MILLER.—Well, we'll object to that question for the reason that it is asking for a conclusion of the witness as to what Mr. Moe thought or what he didn't think or needn't do. [135]

The COURT.—Sustained.

Mr. ARNOLD.—And I further ask that one counsel at a time conduct this examination on a side.

The COURT.—I suppose that would be correct.

Mr. MILLER.—There is no rule to—

The COURT.—Only the court rule.

Mr. ARNOLD.—That's a rule that one counsel on a side cross-examine or examine at a time; not two.

The COURT.—Well, gentlemen, let's make such a rule that counsel conduct his cross-examination one at a time.

Mr. ARNOLD.—Q. Now, then, Mr. Russell, you stated that you never had any money that you could apply on your note to the bank? A. Yes, sir.

Q. Did Mr. Moe ever ask you what you were doing with the money taken in every day and the profits of your business? A. Yes, sir.

Q. Where did you tell him they were going to?

A. I told him it was taking all that was coming in to keep up my stock and keep going, which it was

(Testimony of W. N. Russell.)

doing. I was holding out too much credit which I found out afterwards was impossible to do, and he told me so at the time.

Q. When did he tell you that?

A. Probably once or twice every month when he thought I should be advised to back off on giving [136] so much credit a little bit.

Q. Then you discussed with Mr. Moe the question of your giving too much credit—did you?

A. I did not discuss it with him, I asked him, told him the parties to whom I was giving credit in the lumber business. I didn't ask him if he should give so and so credit. In the lumber business if we're going to give a man credit we tell him "Yes" and go ahead and load him up and get away with it.

Q. He told you at least two or three times a month you were giving too much and too long a credit?

A. No, that's not what he told me.

Q. What did he tell you?

A. I never told him the length of time I was giving the credit. As a matter of fact I made it a point to never give a man over 30 days, but as I found out 30 days meant anywhere from 30 days to never.

Q. So you discussed that phase of it with Mr. Moe, did you?

A. Well, I did not discuss it with him as to how long it was, these accounts coming in, etc., and so on; but I did tell him when he asked who I was giving credit to, those I had in my mind I told him about.

Q. And you told him when you spoke of these ac-

(Testimony of W. N. Russell.)

counts, what credit had been given and how old they were and all that kind of thing—you discussed [137] with him—did you?

A. I can't say I ever told him how old any of them were.

Q. Did he ever inquire?

A. As to that I don't know.

Q. Did he ask you, Mr. Russell, why these accounts weren't collected and all that kind of thing?

A. No, I imagine that he knew as well as myself why they were not collected in.

Q. Now, he never came down to look at any of the books or files of yours—did he?

A. I don't know whether he looked over them; I wasn't in the office every minute of the day.

Q. Well, when you were present.

A. Not while I was there, no.

Q. He never made you bring your books up to him so he could see,—did he?

A. No, he did not. I think I give him sufficient information, didn't think it necessary to see them; at—or at else he had seen them.

Q. Now, Mr. Russell, you stated that at the time you gave this chattel mortgage your stock of merchandise inventoried to your best judgment about \$6,000? A. Yes, I think so.

Q. Well, during the time this chattel mortgage was in existence could you estimate how much merchandise you bought and took into the business, between

(Testimony of W. N. Russell.)

the giving of the chattel mortgage and the date you filed your petition? [138]

A. That \$2,500 now—put \$2,800 I believe in lumber.

Q. Was that independent of what you got from your father? A. No, sir.

Q. Including what you got from your father?

A. That was in lumber and building material, but the coal end of it I can't estimate.

Q. The coal end of it went out as fast as it came in?

A. Practically; yes.

Q. And that was never on hand for any length of time? A. No. No, it wasn't.

Q. You ordered a carload of coal as fast as you wanted it, and it was gone within ten or fifteen days?

A. With the exception of \$150 worth or possibly \$200 worth of coal generally carried in the shed.

Q. Yes. Then included in this stock of merchandise of \$6,000 there would be only at that time about \$200 worth of coal in the shed? A. Yes.

Q. And that was practically all the coal you ever carried on hand at all?

A. Yes; as a general thing.

Q. Now, then, for the purpose of just showing the total amount of merchandise that you did buy subsequent to the giving of the mortgage and prior [139] to the bankruptcy, there's \$565 to the Pacific States Lumber Company—wasn't there?

A. Yes.

Q. \$1,100 worth to Blondel-Donovan—wasn't

(Testimony of W. N. Russell.)

there? A. This Pacific—

Q. I'm talking now of the gross amount.

A. This is after the mortgage was given?

Q. Yes. A. Yes.

Q. \$1,100 to Blondel-Donovan Company?

A. With the two, I think.

Q. \$1,100 including the freight was the Blodel-Donovan bill—wasn't it? \$1,100 would be the value of the lumber at Big Timber, wouldn't it?

A. Yes, sir.

Q. \$1,100 and \$565 would be approximately \$1,650, wouldn't it, Mr. Russell? A. Yes, sir.

Q. And \$131 to the Dakota Plaster Company?

Mr. CAMPBELL.—If the Court please, I'd like to introduce an objection at this time; I'd like to object to that on the ground that it is not proper re-direct examination.

Mr. ARNOLD.—If your Honor please, Mr. Campbell brought out the value of this stock of merchandise at the time the mortgage was given. He never went into it at all. Now, I want to show how Mr. Russell makes this up and test his ability to estimate.

Mr. CAMPBELL.—If the Court please, I never [140] brought out anything about how much was purchased after the mortgage was given. All I brought out was the fact that this stock of goods on hand was so much at the time the mortgage was given for the purpose of showing good faith on the part of the bank. Nothing was said about the amount of merchandise purchased after the mortgage was given.

(Testimony of W. N. Russell.)

The COURT.—No, it was—that was gone into. The question that Mr. Campbell asked was before the mortgage. It is objectionable as having already been gone over. Those facts are all in evidence and show they were purchased subsequent to the giving of the mortgage.

Mr. ARNOLD.—I want to find out the gross amount and then find out the value of the property mortgaged at the time of the filing of the petition.

The COURT.—The objection will be sustained.

To which ruling of the Court, an exception was duly reserved.

Q. Now, then, Mr. Russell, at the time you filed your petition, have you any idea of the value of the stock of merchandise?

A. No, sir; I don't know what it did run.

Q. Could you give any idea of it at all?

A. Well, no; I'll not give any idea because that's too long a guess to make, what a man is [141] selling—buying and selling in that time.

Q. I'm not asking you what you bought and sold, I'm asking you the value to the best of your judgment of the stock of merchandise at the time that you filed your petition in bankruptcy.

A. I could not estimate on that any more than I could—tell the number of bricks in that building over there.

Q. You estimated it at the time you gave the chattel mortgage—didn't you?

A. Estimate it? Yes, three days estimating it.

(Testimony of W. N. Russell.)

Q. Did you take an inventory at the time you gave the chattel mortgage?

A. You might call it an inventory. I spent three days to find out what I had. I did not take three or four men to run around behind me, as a man would to have it down to a dollar—to a cent.

Q. About the month of January, you also took an inventory—didn't you?

A. No—Bert went around and I started with him and took a part of that inventory, but my men took a part of it, and we were hauling at the time, we couldn't give him all of our time there. Bert probably put in a day, or a day and a half that we wasn't with him. And the other was about, I think he probably spent two and a half or three days then. So when it takes that much time to count up these lumber bills, etc., a man would have a pretty nice time of guessing anywheres near what he has got. [142]

Q. Well, Mr. Russell, notwithstanding the fact—would you estimate—you've been in the lumber business for how many years?

A. Well, I was born in the woods, and I'm in them yet, I guess—here in Livingston.

The COURT.—I presume that's not responsive.

Q. No. You've been engaged in the business how long, Mr. Russell?

A. Well, since I've been old enough to be able to figure.

Q. And you're how old now? A. I am 26.

Q. Well, would you estimate your stock of mer-

(Testimony of W. N. Russell.)

chandise at the time you filed your petition in bankruptcy was larger or less than it was at the time you gave the chattel mortgage?

A. I naturally believe that it was less.

Q. Notwithstanding the fact that you had made purchases to keep up the stock of lumber during the six or seven months while the mortgage was in existence?

A. Yes, sir; I made these purchases to keep up the stock as near as possible.

Q. Did Mr. Moe ever ask you whether you were keeping up the stock of merchandise?

Mr. CAMPBELL.—Just a moment—I object to that as incompetent, irrelevant and immaterial.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved. [143]

A. Yes; and he also looked it over once in a while.

Q. Do you know how many times he asked you?

A. Well, I think he mentioned it probably twice a month when he asked me about the whole thing in general; yes.

Q. Did he ask you who you were purchasing merchandise from?

A. No, I don't believe he made that a point of his business who I bought from.

Q. Did he ask you how you were buying it or what terms you were buying it on?

A. No, sir; he did not.

Q. Did he ask you whether you were buying—pay-

(Testimony of W. N. Russell.)

ing for it in cash or its equivalent?

A. No; he did not.

Q. Didn't go into that at all. Did you tell him?

A. No, sir.

Q. When you mortgaged this real estate and merchandise to the Scandinavian American Bank you estimated it and Mr. Moe understood you to estimate it, as you say, to be approximately valued at \$8,000. A. Yes, sir.

Q. Did Mr. Moe give any reason or did he discuss with you why he wanted so much security to take care of a little loan like \$4,165? A. No, sir.

Q. The real estate had been mortgaged to the bank, hadn't it? Before? [144]

A. I don't believe it had.

Q. What was the purpose of giving the mortgage at the time then, Mr. Russell? Why was the additional two thousand dollars of real estate put into the deed—was the bank crowding you?

A. No, but they didn't figure the old mortgage was sufficient—they figured that the security was sufficient and it was due and that a few small notes—that that mortgage was due, of course they're like all the rest of the banks that I ever found, they want all the security they can get.

Q. Now, you also stated on examination by Mr. Campbell that you wanted \$300 to pay a claim that was crowding you at that time—is that a fact?

A. Yes, sir.

A. Well, didn't he ask you at that time whether

(Testimony of W. N. Russell.)

you owed anything else?

A. No, he said, "Who is crowding you?"

Q. He asked you, "Who is crowding you?"

A. Yes.

Q. What did you tell him?

A. I told him that Selters had something against me—an account against me.

Q. Did you say anything to him at that time about your father—you owing your father anything?

A. No.

Q. Do you know whether he knew that you owed your father anything?

A. Why, I don't know that; I don't think that he [145] knew anything about father's business then, because father hadn't been coming down and paying much attention to the business up to that time. I don't believe that father had met him at that time yet. I'm sure that he hadn't, because I remember of introducing him later when he came.

Q. When your father came with your notes?

A. Yes, it was later. Yes—with my notes.

Q. This is a matter I probably should have gone into on direct examination, and I'd like very much to go into this, it will not take but a very few minutes. You speak of some notes that your father had of yours. A. Yes.

Q. Do you remember the amount of those notes?

A. There were either four or five notes and I think secured \$3,100 or \$3,200—I'm not sure about that.

Q. When you speak about them securing \$3,100 or

(Testimony of W. N. Russell.)

\$3,200, you mean that the note represented that?

A. Represented that; yes.

Q. There was no security given?

A. Given principally in his and my estate and to be straightened out with the estate and generally known that way. He represented to Mr. Moe that that is what the notes was given for.

Q. Do you know when this was, about what time that was that these notes were made known to Mr. Moe?

A. No; it was not very long though. It wasn't very [146] long before my petition was filed, in bankruptcy.

Q. How long about?

A. I should judge about two or three months.

Q. Now, as a matter of fact, Mr. Russell, weren't these notes that you gave to your father placed with the Scandinavian American Bank as collateral security for a loan that your father made from the bank of \$200?

A. I think—Yes, I had one there a little while.

Q. Now, then, that note of \$200 representing money that your father borrowed from the bank—state whether or not that was paid by you to the Scandinavian American Bank—the \$200.

A. Whether it was paid to me?

Q. Paid by you to the bank—whether you paid your father's note off at the bank. A. Yes.

Q. Do you know when? A. No, I don't know.

Q. Who did you pay it to, Mr. Russell?

(Testimony of W. N. Russell.)

A. To the bank.

Q. Well, but who at the bank, who was the officer to whom you made payment, if you know?

A. I could not say.

Q. Were you with your father when he borrowed this money from the bank, this \$200?

A. No. But it was about that time, within a day or so father met Mr. Moe.

Q. You didn't know—you didn't assist your father in making the loan of \$200, did you? [147]

A. Of making the loan?

Q. From the bank. A. No.

Q. Was it understood between him and yourself that you were to pay the loan off, this \$200?

A. No, I can't say it was. I don't think I said anything to him about it.

Q. But you did as a matter of fact pay the account?

A. I know I did agree with my father to pay that off, providing I could get some more stock that I needed pretty bad for the yard.

Q. And you did pay this off at the bank?

A. Yes; because I got more credit from the—

Q. Did you pay anybody—any of your creditors anything except what you paid through the Scandinavian American Bank after June 29, 1915, except small accounts, few dollars, something like that?

A. After June 29, 1915?

Q. Yes, after the giving of the chattel mortgage.

A. Yes, there was a little business transacted that was not finished up right there in town.

(Testimony of W. N. Russell.)

Q. What was that, Mr. Russell?

A. It was on a little indebtedness to a party, unpaid—I think it was brought out here during the first meeting, one of them.

Q. This note that was paid off to your father's account at the bank was paid out of moneys in the bank was it, as you paid them?

A. As I remember it, I think it was; yes. [148]

Testimony of E. J. Moe, for Petitioner.

E. J. MOE, a witness duly called and sworn, upon examination by Frank Arnold, Esq., testified as follows:

Q. Mr. Moe, you're the same E. J. Moe are you, who testified on behalf of the Scandinavian American Bank at the commencement of these proceedings?

A. I am.

Q. Was Mr. Russell ever a stockholder in the Scandinavian American Bank?

A. Yes, sir; he was.

Q. Do you know whether or not he is a stockholder at the present time? A. No, I do not.

Q. When did he cease to be a stockholder, if you know. A. I could not say as to that.

Q. Before or after the giving of this chattel mortgage?

A. Well, I could not say as to that, I don't remember when he ceased to be one.

Q. Do you know how many shares of stock he had?

A. As I remember it, he had two.

Q. Now, Mr. Moe, you have with you the ledger

(Testimony of E. J. Moe.)

account of W. L. Russell with the Scandinavian American Bank, have you?

A. Mr. Campbell has it, I believe.

Q. Now, Mr. Campbell, will you produce that ledger account please?

(Produced by Mr. Campbell and handed to witness.) [149]

Q. That account covers what date, what period of time?

A. From May 7, 1915, to October 7, 1916.

Q. Now, starting with June 29, 1915, the date of the chattel mortgage, what is your system, Mr. Moe, what is the system of the Scandinavian American Bank in keeping that account?

A. Individual ledger accounts?

Q. Yes; what method.

A. Well, here's the date, the year and month and day, and checks in detail, and total checks. Whatever deposits happen to come in on the same day, add the deposits to the former balance, subtract the checks for that date and carry out the new balance.

Q. Now, under the heading, we'll take for instance June 29, on the first day under this—on the morning of June 29, what was the balance to the credit of W. N. Russell?

A. \$209.09, morning of June 29.

Q. That would appear under the column headed balance,—would it? A. Yes, sir.

Q. Now, then, the business transactions of June 29, would appear in what manner?

(Testimony of E. J. Moe.)

A. They would appear on the books for June 29.

Q. Now, under the column headed deposits, there is an item under date of June 29, of \$300 and another item of deposit on that date. A. \$200.16. [150]

Q. Now, then, those were the two items of deposit on that date, were they?

A. Two items on deposit on June 29, 1915.

Q. Now, then, under the heading of total checks there is an item of \$559.60; what does that mean?

A. That is the total of three checks paid by the bank on that date.

Q. And those checks are made up of items under the heading of checks in detail? A. Yes, sir.

Q. And constituting the three checks there is one amounting to \$262.00, one amounting to \$251.25, and one amounting to \$46.35—is that correct?

A. You mean 262?

Q. \$262, \$251.25 and \$46.35. A. Yes, sir.

Q. That makes up the total checks with which the account would be charged, or \$559.60?

A. Yes, sir.

Q. Then, under your system, that \$559.60 would be deducted from the balance on hand that morning, of \$209.09, and the two deposits, one \$300 and the other of \$200.16, made on that date? A. Yes, sir.

Q. That would leave a balance close of business on the 29th day of June, 1915, of what?

A. \$149.65.

Q. Now, Mr. Moe, that was to the credit of W. N. Russell, that balance? A. Yes, sir. [151]

Q. Now, Mr. Moe, on the 30th day of June, at the

(Testimony of E. J. Moe.)

close of business, what was the balance to the credit of Mr. Russell?

A. At the close of business on—

Q. On the 30th day of June.

A. 1915—it was \$266.74.

Q. At the close of business on the 30th of June?

A. Yes, sir.

Q. What was the balance to the credit of W. N. Russell at the close of business July 1, 1915?

A. \$265.74.

Q. At the close of business July 2, 1915?

A. \$400.90.

Q. At the close of business July 3, 1915?

A. \$446.91.

Q. At the close of business July 4, 1915?

A. There is no balance for July 4th.

Q. At the close of business for July 6, 1915?

A. \$142.61.

Q. At the close of business July 7th?

A. \$117.39.

Q. At the close of business July 8th?

A. \$52.39.

Q. At the close of business July 9, 1915?

A. There is no July 9th.

Q. At the close of business July 10, 1915?

A. \$25.39.

Q. Now, turning to the month of August, 1915, will you tell me from that account the balance to the credit of W. N. Russell, August 1, 1915? [152]

A. The first balance in August showed on August the second.

(Testimony of E. J. Moe.)

Q. And that was what? A. \$92.87.

Q. What was the balance to his credit on August 3, 1915? A. \$146.45.

Q. August 3, 1915?

A. Wrote in two balances there, one of \$146.45 and the other of \$157.11. That is probably the correct one.

Q. August 4, 1915? A. \$203.59.

Q. August 5, 1915? A. \$242.02.

Q. August 6, 1915? A. \$104.12.

Q. August 9, 1915? A. \$157.14.

Q. Were there any balances on August 7th and 8th of 1915?

A. No. Possibly the account did not change on those two days.

Q. August 11, 1915? A. \$202.51.

Q. Referring now to the month of September, 1915, on the first day of September, 1915, what balance, if any, was there to the credit of W. N. Russell?

A. \$141.45. [153]

Q. On September 2, 1915? A. \$179.95.

Q. September 3, 1915?

A. No balance; the same balance.

Q. On September 4? A. \$53.15.

Q. On September 7th? A. \$13.86.

Q. The balance on the 5th and 6th day of September, then, would be the same? A. No change.

Q. Now, September 9th? A. \$6.36.

Q. Now, referring to October, 1915. What was the balance to the credit of W. N. Russell on the first day of October, 1915?

(Testimony of E. J. Moe.)

A. The balance is the same as on September 29th.

Q. Now, on October 2, what was the balance?

A. \$241.45.

Q. October 4, 1915? A. \$181.20.

Q. October 5, 1915? A. \$304.16.

Q. October 6, 1916? A. \$346.52.

Q. October 8, 1915? A. \$126.51.

Q. October 7, 1915? A. \$398.16.

Q. October 9, 1915? [154] A. \$128.58.

Q. October 11, 1915? A. \$170.60.

Q. Now, during the month of November, 1915, what was the balance to the credit of W. N. Russell on the first day of November, 1915? A. 83.94.

Q. November 2, 1915? A. \$2.79.

Q. November 3, 1915? A. \$53.44.

Q. November 4, 1915? A. \$198.97.

Q. November 5, 1915? A. \$114.30.

Q. November 6, 1915? A. \$312.52.

Q. November 8th, 1915? A. \$65.84.

Q. November 9, 1915? A. \$2.43.

Q. November 11, 1915?

A. \$56.90. Correct that to \$56.09.

Q. The month of December, 1915. December 1, '15? A. An overdraft of \$78.35.

Q. This overdraft of \$78.35, state whether or not, Mr. Moe, that was money loaned to Mr. Russell or which he was permitted to overdraw in addition to the notes which are already in evidence secured by \$250.00 additional credit under the chattel [155] mortgage?

A. No, sir; it was not loaned to him, or was not

(Testimony of E. J. Moe.)

given to him as additional credit.

Q. Well, state whether or not the bank honored his checks so that overdraft appeared on the books on that day?

A. They must have honored the check or it would not appear.

Q. And those checks were outside or exclusive of the additional credit that is represented by the notes under the chattel mortgage?

A. Well, it was not given by the bank as a credit.

Q. Now, then, Mr. Moe, what was the balance—that \$78.35 was then a debit balance on the morning of December 1st?

A. At the close of business on the first.

Q. Now, what was the balance on December 2?

A. \$43.40.

Q. That was what balance?

A. That was a balance at the close of business December 2, 1915.

Q. Was it a credit or debit balance?

A. It was a credit balance.

Q. Now, state whether or not that debit balance of \$78 and some odd cents at the close of business on the first was wiped out by deposits made on the 2d day of December, 1915?

A. It may possibly have been wiped out on the first day of December.

Q. After the close of business? [156]

A. Yes, after the books were closed.

Q. But it would be wiped out by deposits made according to that account. A. Yes, sir.

(Testimony of E. J. Moe.)

Q. What was the balance to the credit of W. N. Russell the 3d of December? A. \$69.79.

Q. On the 4th of December? A. \$191.83.

Q. On the 5th of December?

A. Same balance.

Q. On the 6th of December? A. \$184.17.

Q. On the 7th of December? A. \$406.73.

Q. On the 8th of December? A. \$393.89.

Q. On the 9th of December? A. \$247.17.

Q. On the 10th of December? A. \$381. 35.

Q. Referring now to the first day of January, in the year 1916.

A. The balance run the same from December 31 until the 5th of January.

Q. Until the 5th of January? A. Yes, sir.

Q. Now, on the 6th of January, 1916, what was the balance to the credit of Mr. Russell, if you know?

[157] A. \$39.29.

Q. The 7th? A. \$99.79.

Q. The 8th? A. \$64.59.

Q. And the 10th of December? A. \$95.71.

Q. Referring now to the first of February, 1916.

A. It was the same as his balance on January 26, \$1.11.

Q. And state what the balance was from the first of February, 1916, to February 10th, to his credit.

A. The first day of February to February—up to February 11, 1916, \$1.11

Q. To his credit? A. Yes.

Q. Now, will you refer to your account during the period I have stated and tell whether he on any other

(Testimony of E. J. Moe.)

occasion—on any day the account of W. N. Russell was overdrawn except the item of \$78.35 already gone into.

A. There was an overdraft on January 14, 1916.

Q. To what amount? A. \$4.61.

Q. Any other day?

A. On September 28, 1915.

Q. It was overdrawn to what amount?

A. \$2.05.

Q. Any other overdraft? A. No, sir. [158]

Q. Now, then, Mr. Russell, during the period of time between June 29, 1915, and February 11, 1916, with the exception of the three overdrafts that you have referred to, will you state from your account, or rather the account of the bank with W. N. Russell whether there was or whether there was not at all times a balance at the close of each day's business to the credit of W. N. Russell?

A. There was with the exception of the time he was overdrawn.

Q. Those three items you've mentioned?

A. Yes, sir.

Q. And these overdrafts would be wiped out by deposits at the close of the business that day or the succeeding day? A. Yes, sir.

Q. Your method of keeping that account to which we referred during the beginning of your examination, making deposits to whatever columns the different items should go is the method that the account was kept during the entire time to which we've referred, was it?

(Testimony of E. J. Moe.)

A. The check account was; yes, sir.

Q. Now, that account was kept with W. N. Russell subsequent to June 29, 1915, and up to the date I've mentioned in the same manner that it was kept prior to the giving of this chattel mortgage and during the time that he was doing business with the bank?

A. The same system of bookkeeping? [159]

Q. Yes. A. Yes, sir.

Q. And there was no change in his account, it was kept in the same heading and the account followed on after June 29, 1915, just the same as it had been kept as to method and system, as before?

A. It was kept in the same manner, yes, sir.

Q. And under the same heading?

A. W. N. Russell.

Q. Yes. Now, these balances that were to the credit of Mr. Russell on the specific dates mentioned and the balances that were to his credit at all times from June 29, 1915, to February 11, 1915, state whether or not they were checked out by Mr. Russell and used as he saw fit in his business. A. They were.

Q. None of the items of daily balances to the credit of Mr. Russell were ever taken out of his account and applied on this mortgage indebtedness, was it?

A. No, sir. There was—he made a payment on one of the small notes, but whether he made that by a check or whether he made it in cash I cannot say at this time.

Q. You're referring now to the credit of \$50 on the \$170 note?

A. On one of the different notes; yes.

(Testimony of E. J. Moe.)

Q. Made in January of 1916? [160]

A. I don't remember when it was made. I refer to one of the notes given outside of the mortgage notes.

Q. When was this account closed, Mr. Moe?

A. Its not closed yet.

Q. Is there a balance now to his credit?

A. Yes, sir.

Q. How much? A. \$10.75.

Q. I will draw your attention, Mr. Moe, to Exhibit No. 37, a check for 55 cents, under date of February 23, 1916, who is that payable to?

A. Its payable to the bank.

Q. What bank *what* that be?

A. Why, I suppose the Scandinavian American Bank.

Q. Do you know what that item of 55 cents is for?

A. There's a footnote on there, interest on note for \$196.00.

Q. Are you able to shed any light on that \$196 note?

A. No, sir.

Q. That check is not signed by Mr. Russell, is it?

A. No, sir.

Q. How is that done?

A. Signed "Charge W. N. Russell."

Q. And that would be done by whom?

A. It was done by one of the officers of bank.

Q. And Mr. Russell's account was debited with that fifty-five cents, was it? [161] A. Yes, sir.

Q. With or without his consent?

A. I don't know. It is with.

(Testimony of E. J. Moe.)

Q. And possibly without? A. Yes.

Q. Now, Mr. Moe, that 55 cents interest on a \$196 note, that is not any note that was included in the proof of claim that was filed by your bank in this case, is it? A. I don't know.

Q. Well, referring you to the proof of claim made by the bank, is there any note for \$196 included in that proof of claim? A. No, sir.

Q. Now, is it not a fact, Mr. Moe, that those notes attached to the proof of claim were the only notes that were given by Mr. Russell to the Scandinavian American Bank subsequent to the execution of the chattel mortgage June 29, 1915?

A. I could not say, positively, as to that. He gave us a note and mortgage on an automobile, but whether it was subsequent or prior I could not say.

Q. Do you remember the amount of that note?

A. No, I don't.

Mr. ARNOLD.—I offer "Exhibit No. 37" in evidence.

Mr. MILLER.—We object to it for the reason that it is immaterial and irrelevant to any issue herein at all. It plainly shows that it doesn't apply on any note or any [162] indebtedness with the Scandinavian American Bank for which they have made claim.

The COURT.—I take it its for the purpose to show that moneys were diverted for other purposes rather than paid on the note. The objection will be overruled.

(Testimony of E. J. Moe.)

To which ruling of the Court, an exception was duly reserved.

Q. Drawing your attention to exhibit 38 and check dated October 7, 1916, I will ask you what that is.

A. That is a check payable to the bank for \$1.81.

Q. What was that \$1.81 for, if you remember?

A. Why, there's a note on the check—writing on the check states it was a payment on deposit box.

Q. Do you know anything about it?

A. I don't know anything about it, about the giving of the check, but its possible in payment of a deposit box that Mr. Russell had at the bank.

Q. State whether or not both of these checks exhibit 38 and 37—no, exhibit 38, the check for \$1.81, that was charged after he was adjudicated a bankrupt?

A. I think it was; I don't know when he was adjudicated a bankrupt.

Mr. ARNOLD.—Exhibit No. 38 is offered in evidence.

Mr. MILLER.—We make the same objection.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was [163] duly reserved.

Whereupon "Exhibit No. 38" was received in evidence, which is in words and figures as follows:

Big Timber, Mont., Oct. 7, 1916, Scandinavian American Bank, Pay to the order of Bank \$1.81, One and 81/100 Dollars. (Signed) W. N. Russell. Payment on deposit box.

Exhibit No. 37.

Big Timber, Mont. Feb. 23, 1916. Scandinavian

(Testimony of E. J. Moe.)

American Bank, Pay to the order of Bank 55 cts. Only fifty-five cents—Dollars Chgs W. N. Russell. Int. on Note 196.00.

Q. Now, then, referring to that account, Mr. Moe, when did Mr. Russell cease to do—when was the last deposit made by Mr. Russell to the credit of that account?

A. The last deposit on the account was April 5, 1916; but whether he made it or not I could not say.

Q. How much was that? A. \$10.75.

Q. April 5, 1916, prior to that, when was the last deposit made? A. February 11, 1916.

Q. And at the close of business on that day there was how much to his credit? A. \$12.36.

Q. Now, subsequent to November—to February 11, 1916, has there been any business transacted with your bank except this deposit of \$0?

A. There are three checks. [164]

Q. Amounting to how much?

A. One for \$10, \$11.55, \$11.91.

Q. Then practically, as far as Mr. Russell's business was concerned, his account with the bank closed February 11, 1916—that is as far as doing any real business was concerned. A. Yes, sir.

Q. Now, Mr. Moe, when, if you recollect, was the first time subsequent to June 29, 1915, that you ascertained that Mr. Russell, and the Russell Lumber Company, was in difficulties and owing money to creditors?

A. The first time I knew he was in as bad as he was was when Mr. Wilberg came there to buy him out.

(Testimony of E. J. Moe.)

Q. When was that Mr. Wilberg came there to buy him out?

A. I believe he was there from the first part of January—I think he was conferring with him there about the first part of January and made some contract with Mr. Russell in regard to the purchase of the yard, and then returned, 30 days later I think, to take invoice. I think that was along the first part of February—the first day of February as a matter of fact I believe it was then.

Q. Who is this man Wilberg?

A. He is one of the partners in a large lumber concern at Portland, Oregon.

Q. And do you say you think it was about the first of January that Mr. Wilberg came there?

A. Well, I wouldn't say positively as to that, [165] but I believe I can state positively that it was on February 1 that his contract with Mr. Russell was to be fulfilled.

Q. How long prior to February 1st was it that this contract was entered into?

A. Either 30 or 60 days.

Q. And it might have been the early part of December?

A. It might possibly have been that.

Q. Who was instrumental in bringing Mr. Wilberg to Big Timber to purchase this stock of merchandise and business of W. N. Russell?

A. No one that I know of.

Q. Well, did you take any hand in it?

A. No, sir. Mr. Allen of the Allen Lumber Com-

(Testimony of E. J. Moe.)

pany received a letter from a personal friend of his in Portland, stating that Mr. Wilberg was coming into Montana looking for a good location for a yard and that he was advised—Mr. Allen was trying to get him to locate in Big Timber as he was a very good man.

Q. Mr. Allen is who?

A. Manager of the H. M. Allen Lumber yard at Big Timber.

Q. What Allen is that? A. C. W. Allen.

Q. State whether or not C. W. Allen is a stockholder in the Scandinavian American Bank or was a stockholder at that time.

A. He is, and was. [166]

Q. And a director of the bank? A. No, sir.

Q. You say there was a contract entered into with Mr. Wilberg?

A. I think that Mr. Russell and Mr. Wilberg made a contract; yes, sir.

Q. Did you assist in the making of that contract?

A. I did not assist in the making of it; no, sir; I don't believe I was there the date it was drawn up.

Q. Who drew it up, if you know?

A. I think Mr. Campbell did.

Q. Mr. Campbell was the attorney for your bank?

A. Yes, sir.

Q. At that time? A. Yes, sir.

Q. Do you know where the contract is at the present time? A. No, sir; I do not.

Q. That was a contract for the sale of the entire

(Testimony of E. J. Moe.)

business and assets of the W. N. Russell Lumber Company?

Mr. MILLER.—Just a moment, that is objected to on the ground that it is asking for a conclusion of the witness; and for the further reason that the contract itself is the best evidence as to its provisions.

Q. Do you know where that contract is, Mr. Moe?

A. No, sir.

Q. Where did you see it last? [167]

A. I don't know as I've read the contract over.

Q. And then at that time you knew that Mr. Russell was in difficulties with his creditors?

A. No, sir; I did not know it before the making of the contract—before Mr. Russell made the statement at that time to Mr. Wilberg.

Q. Yes. But you knew at that time?

A. At that time?

Q. Yes. A. Yes, sir; I did.

Q. Did you make any inquiry as an officer of the bank, on behalf of the bank, as to the extent of his liabilities at that time?

A. At the time Mr. Wilberg was there?

Q. Yes. A. Yes; I did.

Q. And have you any recollection as to what you found his liabilities were?

A. I don't remember the amount; no, sir.

Q. Now, for the purpose, Mr. Moe, of refreshing your recollection, do you remember of me coming to Big Timber— A. Yes, sir.

Q. —representing the McKee Lumber Company?

A. Yes, sir.

(Testimony of E. J. Moe.)

Q. And do you remember what date that was?

A. No, sir; I don't.

Q. I saw you on more than one occasion with reference to that account of the McKee Lumber Company with W. N. Russell? [168]

A. Only after Mr. Wilberg had been there—the first visit.

Q. Yes. So then whatever date it was that I first saw you with reference to the McKee account, it was after Mr. Wilberg had been there?

A. His first visit.

Q. And that was on his first visit that you ascertained that the—that W. N. Russell and W. N. Russell Lumber Company was in financial difficulties with its creditors?

A. No, sir. It was not on his first visit. It was when he come there to make a settlement for the yard—invoice.

Q. Hadn't the contract been made prior to that?

A. Yes; they had a contract.

Q. You knew at the time the contract was made that he was in difficulties, didn't you?

A. I knew he had some little difficulties, but I did not know he was in like he was.

Q. When did you find out he was in like he was?

A. When you come down.

Q. After Mr. Wilberg had been there, whatever date it was?

A. When Mr. Wilberg come there the second time and you come down—

Q. I had been there before Mr. Wilberg had been

(Testimony of E. J. Moe.)

there the second time? A. Yes.

Q. And how long, if you recollect, before he was there the second time? [169]

A. I don't remember. You was down so often, the second time I can't exactly remember that.

Q. Do you recollect whether I was down there more than once after Mr. Wilberg's first visit until Mr. Wilberg came there the second time?

A. I don't remember you being there more than once after his first visit.

Q. Until Mr. Wilberg came the second time?

A. Yes.

Q. Now, state whether or not when I was in Big Timber with reference to this McKee account, I advised you of the amount of the McKee Lumber Co.?

A. I think you told me the amount; yes, sir.

Q. Did I discuss with you at that time the statement or approximate statement of Mr. Russell's debts and liabilities that he'd given to me?

A. No, sir.

Q. Do you remember me telling you, or do you not, to refresh your memory, what Mr. Russell had told me with reference to his— A. I don't.

Q. —financial standing? A. No, sir.

Q. Now, then, you stated, Mr. Moe, that it was not until Mr. Wilberg came there the second time that you knew the extent of the disaster.

A. I did not.

Q. But when Mr. Wilberg came the first time, I think you have stated that you knew that he was in some difficulty with his creditors? [170]

(Testimony of E. J. Moe.)

A. I did as soon as you come down there after Mr. Wilberg had been there, knew there was something or other.

Q. Prior to that you knew that some of his creditors were crowding him—did you not?

A. I did not know that he was in bad shape; no, sir.

Q. But you knew some of his creditors were crowding him through Big Timber?

A. I know you mentioned creditors there that morning that he hadn't taken care of.

Q. Yes. Now, then, Mr. Moe, after I came down there with reference to the McKee account, you took no steps to change the situation with Mr. Russell and the account of Mr. Russell as far as the bank was concerned?

A. No. I told you he had the contract for the sale of it and would probably get the money.

Q. It was also understood, Mr. Moe, was it not, that if this contract went through that the bank was to get its money one hundred cents on the dollar?

Mr. CAMPBELL.—This is objected to by reason of the fact it is not the best evidence. He may not testify as to the contract—

Mr. ARNOLD.—I'm not asking for the contract.

Mr. CAMPBELL.—You're asking in relation to the agreement.

Mr. ARNOLD.—I'm not. I'm asking for—if this sale was completed, and Mr. Russell completed [171] his negotiations with Mr. Wilberg, whether

(Testimony of E. J. Moe.)

the bank wasn't to get its money one hundred cents on the dollar.

Mr. CAMPBELL.—We withdraw the objection. I don't think its material, but all right.

Mr. ARNOLD.—Yes.

The question was read.

A. It was not understood that way; no, sir.

Q. Well, you expected, did you not, that when Mr. Wilberg paid the purchase price for this stock of merchandise and the property of the Russell Lumber Company—that is assuming he went through with his contract—did you not, and didn't the bank expect that it was going to get the amount of its claim against W. N. Russell?

A. It understood that all of the creditors were to get their money.

Q. Out of the sale of the assets to Mr. Wilberg?

A. I believe that is about the only way.

Q. Did the bank expect it was going to get one hundred cents on the dollar on its claim?

A. It certainly did.

Q. Out of the proceeds of the sale to Wilberg?

A. Yes, sir.

Q. Otherwise the bank would not have permitted the sale to go through and relinquish its mortgage security?

Mr. O'CONNOR.—That is objected to as immaterial. Whether it would or not.

The COURT.—Overruled. [172]

Q. You were an officer of the bank, weren't you?

A. Yes, sir.

(Testimony of E. J. Moe.)

Q. As an officer of the bank, Mr. Moe, would you have permitted Mr. Wilberg to obtain possession of that property by sale unless—to the property being mortgaged to the bank unless the bank got its money?

A. It wouldn't have been up to me. I couldn't have decided that one way or the other.

Q. Now, Mr. Moe, the bank didn't at any time foreclose either its chattel mortgage or real estate mortgage on which it is relying in this case, did it?

A. No, sir.

Q. During the period between June 29, 1915, Mr. Moe, and up to February 11, 1916, I will ask you whether or not the bank, the Scandinavian American Bank, received for collection drafts or accounts—well, we'll say drafts first—against the W. N. Russell—W. N. Russell in the ordinary course of business of the bank, that were not paid and were returned?

A. They may have received drafts; I cannot say.

Q. Well, do you know whether they received drafts on W. N. Russell between June 29, 1915, and February 11, that were paid?

A. I could not say as to that; no, sir.

Q. You would not say whether—wouldn't say there were none, would you?

A. No, sir. [173]

Q. During the period between June 29, 1915, and February 11, 1916, you knew that drafts were made on Mr. Russell through your bank and through banks in Big Timber—did you not?

A. Why, I wouldn't want to say that I knew.

Q. And you wouldn't want to say that you didn't

(Testimony of E. J. Moe.)

know? A. No, sir.

Q. Now, you heard what Mr. Russell testified, Mr. Moe, with reference to a loan made by his father from your bank and which was secured by his father, F. E. Russell, by notes given by W. N. Russell to his father? A. Yes, sir.

Q. Do you remember that transaction?

A. Yes, sir.

Q. Do you remember that amount of the notes that W. N. Russell had given to his father and which were pledged to your bank as security?

A. No, I do not know the amount.

Q. Do you remember when it was?

A. I would not state positively; but I should imagine it was somewhere along in October.

Q. Of 1915? A. Yes, sir.

Q. Who handled this transaction with F. E. Russell,—do you know? A. I did.

Q. Those notes were ultimately returned to W. N. Russell when the \$200 was paid? [174]

A. Yes, sir.

Q. Now, Mr. Moe, from the account of W. N. Russell that you have in your hand, his ledger account, between the 29th day of June, 1915, and the 11th day of February, 1915, will you please tell us the total amount of the deposits that Mr. Russell made in the Scandinavian American Bank?

Mr. O'CONNOR.—That is objected to as immaterial, unless the question is confined to deposits made—all the deposits made during the time of the mortgage.

(Testimony of E. J. Moe.)

The COURT.—Overruled.

To which ruling of the Court, an exception was duly reserved.

I think that is all at this time.

Cross-examination by Mr. CAMPBELL.

Q. Does this ledger account which you have here cover the checking account of Mr. Russell over all the time that he did business with the bank?

A. Well, I cannot say that it does. I think he was doing business with us along in 1914. The sheets for that aren't here.

Q. And all the sheets from his individual account in the individual ledger in the Scandinavian American Bank were not brought along?

A. Wasn't in this bunch; no, sir.

Q. Have you any personal recollection of any [175] checks of Mr. Russell being turned down for lack of funds? A. Yes, sir.

Q. Do you know how many times this occurred?

A. A great many times.

Q. Was it the custom of the bank to allow Mr. Russell to overdraw his account?

A. Not the custom of the bank to allow any one to overdraw.

Q. There's one item which was brought out on direct examination of an overdraft of Mr. Russell in December for \$78.35. Have you any recollection of the circumstances in connection with that overdraft?

A. I have not.

Q. You don't know then what the checks which caused that overdraft were given for?

(Testimony of E. J. Moe.)

A. I could not say what the check was given for. It may have been possible the check came in and he made a deposit—probably called him up that evening, as we usually did, to make a deposit on that day; and he probably did after we'd closed our books during the evening. What the check was given for I could not say.

Q. Did the bank ever allow him to overdraw his account when they did not know of the overdraft and it was taken care of? A. No.

Q. You testified on direct examination something about a contract with a man by the name of Wilberg. [176] Do you remember about when this contract between Mr. Wilberg and Russell was entered into?

Mr. ARNOLD.—Just a moment, the contract itself is the best evidence, and it's objected to. I have no objections if you have the contract, of the contract going in.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

A. I would not state positively, but it was either 30 or 60 days before the first of February, 1916.

Q. Was it not made during the Christmas holiday season in the year 1915?

Mr. ARNOLD.—Just a moment; that is objected to on the ground that the question has already been answered. Suggestive. And also that it's not the best evidence. I'm willing to have the contract go in if they have got it.

The COURT.—It is objectionable in that the wit-

(Testimony of E. J. Moe.)

ness states he does not know when it was. That it was either 30 or 60 days before.

Mr. CAMPBELL.—He was put on by Mr. Arnold—this is Arnold's case.

The COURT.—I understand but—is he supposed to be your witness, Mr. Arnold?

Mr. ARNOLD.—Yes, sir.

The COURT.—Very well, the objection is sustained on the ground that the witness has already [177] answered the question.

To which ruling of the Court, an exception was duly reserved.

Q. Do you know when Mr. Wilberg was to take over the lumber yard under the terms of that contract?

Mr. ARNOLD.—Now, that is objected to on the ground that the contract is the best evidence. I was precluded under objection from going into the consideration of that contract on the ground that it was not the best evidence, and the contract itself is the best evidence. I object to it on the ground that it is incompetent; and I state now that if Mr. Campbell will produce that contract I haven't the slightest objection to it going into evidence.

Mr. CAMPBELL.—I don't either, I wish I had it here.

The COURT.—The question was asked if he knew the contents of the contract and he testified he did not know. You may ask him if he knows and then show where the contract is. He does not know

(Testimony of E. J. Moe.)

where it is, he has testified he doesn't know the contract.

Mr. CAMPBELL.—Can't the memory of the witness be refreshed?

The COURT.—Yes, go ahead and ask him the question. The objection is overruled.

Mr. ARNOLD.—If your Honor please, I've no objection [178] to this if they will let me go into the consideration of that contract and other details. I've no objection to them going into it. I don't want to be precluded tho.

Mr. CAMPBELL.—I'm perfectly willing to go into the details of that contract and I'll bring it out on the testimony here now of Mr. Moe. Mr. Moe testified in answer to the question that he didn't know the terms of the contract.

Mr. ARNOLD.—Can't you get the contract here on this afternoon's train?

Mr. CAMPBELL.—I don't know whether my assistant down there can find it or not. Its mighty doubtful.

The COURT.—Well, answer the question.

To which ruling of the Court, an exception was duly reserved.

A. As I stated to Mr. Arnold, I'm perfectly positive it was February 1, 1916.

Q. Did Mr. Wilberg appear on or about the first day of February? A. He did.

Q. What did he do after he got there?

Mr. ARNOLD.—Just a moment: That is objected to on the ground it is incompetent and immaterial.

(Testimony of E. J. Moe.)

The COURT.—Well, it's objectionable on the ground of being indefinite. With reference to [179] this particular transaction, Mr. Campbell?

Mr. CAMPBELL.—All right.

Mr. ARNOLD.—That is objected to on the ground that it is incompetent and immaterial.

The COURT.—We're not going into it very far, Mr. Arnold. You touched on it a little bit.

Mr. ARNOLD.—For the purpose of bringing out the fact that the bank had knowledge of the difficulties of Mr. Russell at the time Mr. Wilberg came there.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

A. He invoiced the yard; Russell Lumber Yard.

Q. Do you know of your own knowledge approximately what that invoice of the yard amounted to?

Mr. ARNOLD.—Wait a minute, just a moment—Oh, Well, let it go.

A. I wouldn't want to say exactly, but I believe it was something over \$5,000.

Q. Between the first day of January, 1916, and the first of February, 1916, how many different times did you have conversation with Mr. Frank Arnold, the attorney present here, about the account of the McKee Lumber Company?

A. I wouldn't say for sure, but I know that I had one conversation with him at Big Timber.

Q. And isn't it a fact also that attorney Arnold called you up over the phone from one to three times

(Testimony of E. J. Moe.)

a day for about a week during the first [180] week in the first of February about the account of the McKee Lumber Company?

A. He called me up several times; I know.

Q. Were you present at a meeting which was had in the banking rooms of the Scandinavian American Bank when there was present Warren Russell, Frank Arnold, Mr. Wilberg, myself and F. E. Russell, along about the end of the first week in February?

A. I remember being present at a meeting, I can't say as I remember F. E. Russell being there; the rest I can.

Q. And what took place at that meeting, if you know?

Mr. ARNOLD.—That is objected to on the ground that it is incompetent and immaterial.

The COURT.—The objection will be sustained. Not proper cross-examination.

Mr. CAMPBELL.—It seems to me, your Honor—

The COURT.—You may make an offer of proof. I think that would be the proper procedure. For you to make an offer of proof of what you want to show.

Mr. CAMPBELL.—If the Court please, Mr. Arnold made a point of the fact that the bank did not take any steps to foreclose this mortgage and allow it to drift along until he was eventually put into bankruptcy, and I'd like to show the circumstances surrounding the closing days of Mr. Russell's financial career, and to show [181] some of the reasons

(Testimony of E. J. Moe.)

why the bank did not take steps to foreclose and to protect their interests. And further to show that the bank was acting in good faith at that time and that they were not acting in bad faith, as Mr. Arnold has endeavored to elicit from this witness.

The COURT.—If you want to make an offer of proof, you can. The question asked the witness as to whether the bank had foreclosed or not is clearly material under the matter.

Mr. O'CONNOR.—The motives of the bank, if the Court please, ought to be material.

The COURT.—If you want to make an offer of proof—if you want to put Mr. Moe on the stand as your witness, you may go into anything that's material.

Mr. O'CONNOR.—All right, I'll do that.

That is all now.

Redirect Examination by Mr. ARNOLD.

Q. Mr. Campbell asked you whether I did not call you up between January 1, 1915, and February 1, 1916, with reference to the McKee account, and I think you answered that I did.

A. I answered that you called me up several times.

Q. And about other accounts also, didn't I?

A. I know that one account in particular. [182]

Q. But I told you that I had others?

A. Oh, yes; you told me you had others.

Q. When I was down there, after Mr. Wilberg had been there, when did I see you?

A. The first time you were in there.

Q. And I told you I had other accounts, as a mat-

(Testimony of E. J. Moe.)

ter of fact I endeavored to get you to pay them on behalf of Mr. Russell, didn't I, Mr. Moe?

A. You tried awfully hard to get me to pay one of them, I know.

Q. Now, you stated in reply to a question from Mr. Campbell that when Mr. Wilberg took that inventory of the yards the early part of February, it invoiced about \$5,000?

A. Invoiced over \$5,000.

Q. Do you remember how much over?

A. No, sir; I don't.

Q. That included of course his estimated value of the buildings and sheds and real estate and the merchandise, did it not? A. I believe it did.

Q. And that was on the theory that the Russell Lumber Company was a growing concern and he would purchase at that price with that idea?

A. I don't understand just what you mean.

Q. Those values were fixed on the theory and with the understanding that he was purchasing a growing business and not a business that was closed down.

A. A growing business—yes. [183]

Q. Now, I got those figures from you, didn't I?

A. I don't know whether you got them from me, or not.

Q. Well, I got them from Mr. Wilberg at the time of this meeting early in February.

A. You might have—I don't know.

Q. Now, if I was to show you these figures would you be able to refresh your recollection from them?

(Testimony of E. J. Moe.)

A. I could not say whether I could tell or not. No, sir.

Q. Now, isn't it a fact, Mr. Moe, that \$5,000, or a little over, included the stock of lumber at Springdale? A. I don't know as to that.

Q. Well, now, I will draw your attention to a slip with some figures on it and ask you, Mr. Moe, if that is the values that were placed on the property in the lumber yard and the property at Springdale?

A. No, sir; I don't think those are the figures.

Q. You don't think that is the figures that we obtained?

A. I don't think that is the total; no, sir.

Q. And you don't think those are the figures that were obtained at the meeting to which reference has been made when Mr. Bert Wilberg was present, F. E. Russell, E. J. Moe, C. W. Campbell, W. N. Russell and myself were present in the rear office of the bank? [184]

A, You may have obtained it from there but I don't think those are the figures. I don't think they are.

Q. You wouldn't say they are not?

A. I wouldn't say that they were and I would not say they were not; I don't think they are.

Q. The contract was—that was entered into with Mr. Wilberg, agreeing as to prices and all that, antedated my visit to Big Timber, did it not?

A. What contract do you mean—

Q. When Mr. Wilberg was there first, which was before my visit to Big Timber, he entered into the

(Testimony of E. J. Moe.)

contract that he has referred to with Mr. Russell, fixing prices at which these things were to be bought.

A. He entered into the contract, I don't know what prices were fixed.

Q. Before I was down there?

A. Before I met you in the bank; yes, sir.

Q. The first time? A. Yes.

Q. Now, you stated to Mr. Campbell that the Scandinavian American Bank turned down checks of W. N. Russell subsequent to June 29, 1915; a great many times for lack of funds. A. Yes, sir.

Q. How soon after the 29th day of June, 1915, did that commence?

A. Well, I could not say as to that.

Q. Quite a while before the first of the year 1916?
[185]

A. Ever since he carried the account in the bank.

Q. What?

A. That happened ever since he carried the account in the bank that he'd have or attempt to have an overdraft.

Q. Or attempt to have one?

A. It wasn't our usual custom to carry overdrafts.

Q. Well, his usual custom; I don't mean the custom of the bank.

A. It don't show it from these sheets.

Q. No; but I'm referring now to the proposition if you turned the checks down, they wouldn't be paid,—were they? A. Yes, afterwards.

Q. Yes; but at the time of the turning them down you wouldn't pay them or else they would appear on

(Testimony of E. J. Moe.)

an overdraft? A. Yes.

Q. Now, then, that was his regular custom then, even before June 29, 1915, to attempt to obtain overdrafts and you turned the checks down?

A. I don't know whether it was his regular custom—

Q. But it frequently occurred?

A. There was frequently checks come in overdrawn.

Q. And there was no change in that policy so far as Mr. Russell was concerned, even after the chattel mortgage was given?

A. Oh, quite a number of times afterwards he had checks turned down.

That is all. [186]

Testimony of J. G. Ellingson, for Respondent.

J. G. ELLINGSON, produced as a witness, having been first duly sworn, upon examination testified as follows:

Examination by Mr. ARNOLD.

Q. You're the trustee in bankruptcy in this case, are you? A. I am.

Q. As such trustee you have in your possession the property and assets of the bankrupt, Wm. Russell, have you?

A. Why, I did have up until the sale of part of it; yes, sir.

Q. And you have in your possession the proceeds of property that has been sold but that has not been disbursed, subject to the order of the Court?

(Testimony of J. G. Ellingson.)

A. Yes, sir.

Q. Now, Mr. Ellingson, at the present time what property has the trustee on hand belonging to the estate of W. N. Russell. A. The accounts—

Q. That have already been referred to.

A. That have already been referred to, and the proceeds from the sale of the stock in yards, also the proceeds from some collections made.

Q. And the proceeds of the sale at Springdale—has that been sold? A. Yes, sir.

Q. Now, then, approximately, what money have you got on hand now? A. About \$2,600. [187]

Q. And that is where?

A. Deposited in the bank at Big Timber,

Now, then, included in that \$2,600 is the proceeds of the sale of merchandise in the yards at Big Timber, two lots that were sold that were not covered by a mortgage to the bank at Big Timber, and the proceeds of the sale of the lumber that was at Springdale—is that correct? A. Yes, sir.

Q. You also have, have you not, included in that \$2,600 an item of \$350 which is the difference between the selling price of the real estate which was mortgaged to the Scandinavian American Bank and sold for \$1,850 less the \$1,500 which was paid to the bank on account of that, under the order of the Court? A. Yes, sir.

Q. That is \$350 included?

A. Included in the sum total.

Q. Yes. Now, as I understand it, the real estate has been sold. A. Yes, sir.

(Testimony of J. G. Ellingson.)

Q. At Big Timber? A. Yes.

Q. And the bank has had paid to it the value of that real estate, that which was mortgaged to the bank, less \$350 which is being held under order of the Court? A. Yes, sir.

Q. Now, then, are there any other assets belonging [188] to the estate, except these book accounts that you have referred to? And which was spoken of the day before?

A. There's no assets of any value; no.

Q. Well, what other assets is there?

A. The homestead or the ranch.

Q. Is there any equity in that in your judgment which will be available as an asset for the benefit of creditors of the estate? A. I do not think so.

Q. There is a mortgage on it?

A. There is a mortgage on it. Two of them.

Q. Do you know the amount of those two mortgages?

A. The mortgage including the interest aggregates about \$5,100.

Q. And that ranch consists of what, how many acres? A. 320 acres.

Q. You've inspected that ranch, have you?

A. I have.

Q. And in your judgment there is no equity in it.

A. I don't think so.

Mr. CAMPBELL.—If the Court please, I move to strike out the answer of the witness as a conclusion of the witness. The fact remains to be seen.

The COURT.—The objection will be overruled, and

(Testimony of J. G. Ellingson.)

taken for what it's worth. It's a conclusion of the witness of course, but that is—it can be shown of course, that [189] he is in the land business and that he is competent to judge.

You're engaged in the real estate business among other businesses at Big Timber—are you?

A. Yes, sir.

Q. Are you familiar with the lands in the vicinity—farm lands in the vicinity of Big Timber?

A. Yes.

Q. And in Sweet Grass county? A. Yes, sir.

Q. Whereabouts is this 320 acres?

A. Out in what is known as the Coulee—in the eastern portion of Sweet Grass county.

Q. You're familiar with the value of other lands in that vicinity, are you? A. Yes, sir.

Q. Basing your opinion on the knowledge that you have as a real estate man and on the sales of land in Sweet Grass county in that vicinity and your inspection and examination of that land, what would you say is the value per acre of that 320 acres?

A. \$10.

Mr. ARNOLD.—At this time it is admitted that the following accounts in favor of the persons named and the amounts have been filed with the referee in bankruptcy here.

Atlas Oil Co., \$154.43. Northwestern Lumber and Shingle Company, \$575.00. McCormick Lumber Co. \$750.50. Central Door and Lumber Company, \$528.94. [190] Eureka Lumber Company, \$342.43. Eclipse Paint Co., \$141.05. Montana Coal and Iron

(Testimony of J. G. Ellingson.)

Co., \$162.92. Pacific Lumber Agency, \$460.14. Lindstrom Handforth Lumber Co., \$151.75. The Standard Paint Co., \$177.93. The McKee Lumber Co., \$494.64. Pacific States Lumber Company, \$379.22. Blodel Donovan Lumber Co., \$64.56. Dakota Plaster Company, \$49.40. Scandinavian American Bank, \$4,620.90,—that it has been filed as a preferred claim.

Aultman Taylor Manufacturing Co., \$2,590, upon which they claim to have some credit.

Warren N. Russell, \$24.15.

Q. Now, Mr. Ellingson, have you made an examination of the accounts due to the Russell Lumber Co. or you as trustee, amounting to a little over \$1,600, the result of sales made since June 29, 1915, which were referred to day before yesterday?

A. Yes, sir.

Q. Now, after examining those accounts, can you state the amount of those accounts for which credit has exceeded thirty days? In other words, how much of that money has been on a longer credit than 30 days?

Mr. CAMPBELL.—I want to object to that question for the reason that it is incompetent, irrelevant and immaterial; and for the further reason that there has been no showing made that the bank or any of its officers have any knowledge or in any way consented to the extension of credit by [191] Mr. Russell for a period of longer than 30 days.

The COURT.—The objection will be overruled.

(Testimony of J. G. Ellingson.)

To which ruling of the Court, an exception was duly reserved.

A. There's \$1,611.72.

Q. Now,—and those accounts are still unpaid?

A. Those are still unpaid; yes.

Q. Now, Mr. Ellingson, have you checks given by W. N. Russell between June 29, 1915, and February 11, 1915, given to J. Loving? A. I have.

Q. Have you made an examination of those checks?

A. I have not looked them all over but—

Q. But have you computed the amount that those checks total? A. I have.

Q. How much do they total? A. \$2,428.96.

Q. Those were all given, were they, between June 29, 1915, and February 11, 1915? A. Yes, sir.

Q. During that period of time did you know Mr. Loving? A. I did.

Q. And what business was he engaged in at that time?

A. Agent for the Northern Pacific Railway.

Q. At where? A. At Big Timber. [192]

Q. How large a place is Big Timber, Mr. Moe?

A. Why about 2,000 people.

Q. Do you know the place of business of the Scandinavian American Bank? A. I do.

Q. At Big Timber? A. I do.

Q. And that is on what street, Mr. Ellingson?

A. McLeod Street and Main Street.

Q. Do you know where the place of business of the W. N. Russell Lumber Company was?

(Testimony of J. G. Ellingson.)

A. I do.

Q. That was on what street? A. First Avenue.

Q. And how far was the place of business of the W. N. Russell Company from the Scandinavian American Bank?

A. About three and a half blocks; or something like that,

I think that is all.

Cross-examination by Mr. CAMPBELL.

Q. What did you say the total of these checks were to J. Loving? A. \$2,428.96.

Q. And what period of time was those checks covering?

A. The first one is July 3, 1915, and the last one is January 24, 1916. [193]

Q. Do you know what those checks were given for?

A. No, I don't. Only from what—evidently from the check stubs I presume it would be freight.

Q. Do you know of your own knowledge that J. Loving was the local agent of the Northern Pacific Railway Co. at that point during all that time and times that are mentioned in those checks?

A. I cannot say that I know exactly when he left the depot and went to the bank. It was approximately the first of the year I think; but I don't know positively.

Q. You say there are uncollected accounts owing to you now as trustee of Warren Russell, accounts aggregating \$1,611?

(Testimony of J. G. Ellingson.)

Mr. ARNOLD.—He did not say that. He stated that of those accounts that were mentioned there was unpaid that amount. He did not say they were owing to him as trustee— I object to the question.

Mr. CAMPBELL.—All right; I'll withdraw the question.

Q. You say there are uncollected accounts which are owing to W. N. Russell, bankrupt, aggregating \$1,600—\$1,611 to be exact?

A. No—there's \$1,611 due the Russell Company as a bankrupt that are in excess of a 30-day credit of account, of stuff sold between the 29th day of June up to the time of closing.

Q. Has any effort been made to collect these accounts? [194]

A. There has.

Q. What effort?

Mr. ARNOLD.—That is objected to on the ground that it is incompetent and immaterial.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

A. Notices have been mailed to them all.

Q. That is as far as any effort has been made, tho?

A. Two notices is all.

Q. What sum in addition to the \$1,611, accounts owing to the Warren Russell Lumber Co., bankrupt, which have been uncollected to this date?

A. I could not say without looking them up.

Q. Can you estimate the amount?

A. Off-handed I would say about \$200.

(Testimony of J. G. Ellingson.)

Q. What was the total amount of accounts receivable at the time that you became trustee in this matter?

A. My recollection is that the accounts footed \$2,000 or \$2,100.

That is all. [195]

Testimony of E. J. Moe, for Petitioner (Recalled).

E. J. MOE, a witness recalled to the stand for further examination, having been previously sworn, testified as follows:

Direct Examination by **Mr. ARNOLD**.

Q. Have you now with you, Mr. Moe, the amount of deposits made by W. N. Russell Lumber Company or W. N. Russell in the Scandinavian American Bank between June 29, 1915, and February 11, 1916, inclusive? **A.** I have.

Q. What was the total amount of those deposits as shown by the ledger account?

A. The total from June 29, 1915, to October say 1916, amounted to \$8,703.35.

Q. I think that is all. Well, I'd like to offer in evidence those ledger sheets, if the Court please.

The COURT.—Well, I think in as much as he has stated the contents of them under oath, that that is sufficient.

Mr. CAMPBELL.—We object to the original sheets offered.

Mr. ARNOLD.—Suppose we ever want that again; suppose there should be a mistrial in this case and it comes back and that record is lost?

(Testimony of E. J. Moe.)

Mr. O'CONNOR.—There's no danger of that record being lost. Bank records aren't usually lost.

Mr. ARNOLD.—Well, I'm not familiar with the banking [196] business, but I offer those in evidence, the ledger account of the W. N. Russell Lumber Company and W. N. Russell, from June 29, 1915, to February 11, 1916, and I will state that I will consent that the attorneys for the bank may withdraw those originals and substitute copies.

The COURT.—Very well; they will be admitted with that understanding.

Whereupon "Exhibit No. 61," five sheets, was admitted in evidence, in words and figures as follows. (See back of transcript.) [197]

**Testimony of W. N. Russell, for Petitioner
(Recalled).**

W. N. RUSSELL, a witness being recalled to the stand, having previously been duly sworn, upon further examination testified as follows:

Direct Examination by Mr. ARNOLD.

Q. I will draw your attention, Mr. Russell, to checks given by you to Mr. Loving between the 3d day of July, 1915, and February 11, 1916. Aggregating, according to the figures of Mr. Ellingson, \$2,428.96. Those checks were all drawn by you, were they?

A. Looking over them hurriedly I believe they were all given—drawn—signed by me.

Q. And given to Mr. Loving and paid through the Scandinavian American Bank and charged to your account?

(Testimony of W. N. Russell.)

A. I think that they were all paid with the exception of two or three I noticed.

Q. Those were paid, were they not?

A. They have notices on them—I don't—didn't stop to see whether they had been paid or not.

Q. Now, what were those checks given to Mr. Loving for?

A. The great amount of these checks were given for freight. Possibly one or two for lease on right of way and possibly a few for demurrage on cars. And there may be one or two of them sight drafts attached to shipments and paid with the freight.

Q. The greater part of the amount would be for [198] freight.

A. Yes, sir.

Q. Now, Mr. Russell, referring to these notes, merchandise that was purchased subsequent to the giving of that chattel mortgage from the persons we've already gone into, you stated that these—that this merchandise was received into your yards—I'm talking now of what was purchased subsequent to the giving of the chattel mortgage, and prior to the time of the filing of the petition, Blondel Donovan, McKee, and others, merchandise received into your yards—

A. Yes.

Q. —now, then I will ask you whether or not the portion of that lumber that was received from them, and received into your yard, that was not sold, passed into the hands of the trustee at the time of your bankruptcy?

A. It did.

Q. Now—I don't know whether I asked you the

(Testimony of W. N. Russell.)

question, of the amount of your indebtedness to your father at the time that this chattel mortgage was given—how large or how much did you owe him at that time? A. I think about \$3,100.

Q. Now, then, outside of the property that was mortgaged to the bank, leaving that out of consideration, at the time you gave the mortgage to the bank, did you or did you not retain enough assets in your possession to pay your father and your other [199] creditors who were in existence on June 29, 1915?

Mr. O'CONNOR.—That is objected to as immaterial.

The COURT.—What is your idea, Mr. Arnold?

Mr. ARNOLD.—Simply to show that the bank, assuming that it had a right to take all of this property mortgaged to it, there was not enough left in Russell's possession to pay his other creditors that then existed.

Mr. O'CONNOR.—There is no contention made here that preference was given.

The COURT.—Will you read the question?

The question was read.

The COURT.—Answer the question.

A. I had enough to pay them all at that time; yes.

Q. I mean leaving out what you mortgaged to the bank, you say you think the value of the property that you mortgaged to the bank was \$6,000 in merchandise, and \$2,000 in real estate; but leaving that \$8,000 out of consideration, not including that, did

(Testimony of W. N. Russell.)

you have enough exclusive of that \$8,000 mortgaged to the bank, to pay your father and your other creditors that you were owing money to on the 29th day of June, 1915?

A. Yes, I valued my ranch at enough to pay the whole works.

Q. When you speak of the ranch you speak of the ranch that was mortgaged for \$4,000?

A. I don't know whether it was mortgaged for that amount at that time.

Q. Wasn't it mortgaged at that time to the [200] Citizens State Bank and the Aultman Taylor Co.?

A. Whether it was or not, there was such an agreement under foot that the ranch as far as I was concerned would be clear.

Q. Outside of the ranch itself though, leaving the ranch out of consideration.

Mr. O'CONNOR.—Well, are you going down the line and eliminate one thing after another until you finally get him broke?

Mr. ARNOLD.—Well, we've got testimony here that the ranch was valued at \$10 an acre.

Mr. O'CONNOR.—You're trying to impeach your own witness.

Mr. ARNOLD.—It's a new one on me if you can't—

Mr. O'CONNOR.—Not unless you do it in the proper way.

The COURT.—Well, that would be immaterial.

Q. Well, then, what assets did you have on June

(Testimony of W. N. Russell.)

29, 1915, in addition to your equity in the ranch and the property on the ranch in this \$6,000—this mortgage—this merchandise that was mortgaged to the bank, and this real estate that was mortgaged to the bank?

A. I had considerable on my books due at that time.

Q. That was all, was it?

A. I had a little other real estate at that time, I believe.

Q. What was the approximate amount of the book accounts—approximately, you needn't figure them exactly. [201]

A. Approximately about \$3,000.

Q. And this other bit of real estate?

A. That, I don't know the exact value of it; it was property out of this county, my father had gotten for me.

Q. You haven't got it now?

A. No. Whether he has left them in my name yet or not; I don't know.

Q. About what was the value of it?

A. Well, sir; I don't know that.

Q. Two or three hundred dollars?

A. Possibly fifteen hundred.

Q. Where is it? A. Lots in Three Forks.

Q. And that is all you had?

A. And the way the lots were advancing, I don't know myself just what they were worth. They were a present to me and whether he took them back to sell them before that date and carried me for a little

(Testimony of W. N. Russell.)

more credit or not, I don't know; but that was outside of the business anyhow.

That is all.

Cross-examination by Mr. CAMPBELL.

Q. You say that the date you gave a mortgage to the bank you were indebted to your father in about \$3,100?

A. Well, I did not make the statement; no. I said I thought so; but that is merely a guess. [202] I have nothing to show with me what it was.

Q. Did you inform the bank or any of its officials at the time you negotiated the loan of \$4,165, that you were indebted to your father in that amount or anything at all?

A. Just one account that I asked them for additional money to settle was all, a \$300 account held by Mr. Selters. I asked the bank for that to settle that account.

Q. None of those checks which were given to J. Loving which were spoken of here a little while ago, aggregating \$2,498.96, was given to him as an officer of the bank, were they? A. No, they never were.

Q. They were given to him as agent of the Northern Pacific Railway? A. They were.

It is admitted by Mr. Arnold that the checks in question were given for freight.

Q. Have you any idea of the amount of that \$2,428.96 was paid for bills of lading attached to the freight bills?

Mr. ARNOLD.—I've just admitted in the record

(Testimony of W. N. Russell.)

that that \$2,496 was paid for freight.

Mr. CAMPBELL.—Oh, yes, but he told you a while ago that part of them were—

Mr. ARNOLD.—If your Honor please, we've just admitted by stipulation that \$2,496 was paid for freight.

The COURT.—Why go into it if you have admitted it? [203]

Mr. CAMPBELL.—I want to show that part of it was bill of lading.

Mr. ARNOLD.—We've just admitted it was paid for freight; and it went into the record.

Mr. CAMPBELL.—But he testified a little while ago—

Mr. ARNOLD.—If your admission isn't worth anything, don't make it then.

Mr. CAMPBELL.—Part of that might not only have been for freight but it might have been goods sent in there and paid for before it was delivered.

Mr. ARNOLD.—If the Court please, at their request I admitted it was paid for freight and now they want to show it wasn't.

The COURT.—Answer the question. Overruled.

To which ruling of the Court, an exception was duly reserved.

A. No, I have not. But I don't think that over a hundred or two hundred dollars of it. I might add there, it's a little hard to try to have charge of everything and—in my hauling stuff to Lake Basin I often times received checks from those people there

(Testimony of W. N. Russell.)

which I put in my—through my bank—checked out—

Mr. ARNOLD.—Just a moment, just a moment, I object to the answer of the witness because that has nothing to do with the Loving checks on which he is being examined now.

The COURT.—The objection will be sustained on [204] the ground that it is not responsive to the question.

Q. You stated in some of your prior testimony, did you not, that at the time that this mortgage was given that you were solvent?

Mr. ARNOLD.—Just a moment, that is objected to on the ground if he said that, this is repetition.

Mr. CAMPBELL.—I asked him if he did say that. There's nothing wrong about that.

Mr. ARNOLD.—Object to it on the ground that it is repetition, having already been gone into on previous examination; and on the ground that whether or not he was solvent would be a conclusion of the witness, and the question of whether or not he was insolvent could only be—or solvent could only be determined after a full inventory of the assets and liabilities had been taken.

The COURT.—You may answer the question yes or no; whether you said that.

A. No.

Q. If you hadn't been attached in January and had been left alone by your creditors could you have paid your debts? A. Yes.

(Testimony of W. N. Russell.)

Mr. ARNOLD.—Just a moment—just a moment. I move that that answer be stricken out until I can put an objection in. [205]

The COURT.—Strike it out.

Q. Now, then, that is objected to on the ground that it is argumentative, and calling for a conclusion of the witness; and there is nothing in the evidence to show that he was ever attached.

The COURT.—The objection will be sustained. It is objectionable on all of those grounds.

Q. Were you attached during the month of January?

Mr. ARNOLD.—Just a moment. That is objected to on the ground that it calls for a conclusion of fact and conclusion of law; and it is immaterial whether he was attached or whether he was not attached. Have a right to attach people's property under the laws of this state.

The COURT.—It is objectionable in that it is not proper cross-examination.

Q. Well, who was it that was continually harassing you in the carrying on of your business during the pendency of the lien—mortgage to the Scandinavian American Bank?

Mr. ARNOLD.—That is objected to on the ground that it is immaterial, calling for the conclusion of the witness, and argumentative.

The COURT.—Well, as I understand it, gentlemen, there is no evidence here to show that anybody was harassing him. The objection will be sustained.

(Testimony of W. N. Russell.)

No evidence to show anybody was harassing him.
[206]

Mr. O'CONNOR.—The record is replete with evidence that creditors were continually bothering him through their representatives.

The COURT.—The word “harassing” has never been used in this court.

Mr. O'CONNOR.—Well, but there's no difference between “harassing” and “bothering.”

The COURT.—There's a way of getting at that, Mr. Campbell. The objection is sustained.

Mr. CAMPBELL.—Well, I believe that is all any way. [207]

Testimony of Frank Arnold, for Petitioner.

FRANK ARNOLD, duly called as a witness in the above-entitled matter, having been first duly sworn, testified as follows.

Mr. ARNOLD.—I desire to state that the first time that I saw Mr. Moe with reference to the account of the McKee Lumber Company was on the 23d day of December, 1915.

Mr. O'CONNOR.—I move to strike the evidence of the witness out as being immaterial. He's probably seen a good many people the past year.

The COURT.—The objection will be overruled. Proceed, Mr. Arnold.

Mr. ARNOLD.—I was present at the meeting in the rear room of the Scandinavian American Bank at the time that Mr. Wilberg was there with F. E. Russell, C. W. Campbell, E. J. Moe and W. N. Rus-

(Testimony of Frank Arnold.)

sell, when the question of the sale of the merchandise in the lumber yards and the real estate at Big Timber was under discussion with Mr. Wilberg, and there was discussed at that time the inventory that had been taken by Mr. Wilberg, and he gave to me at that time in the presence of Mr. Moe and Mr. Campbell the values that he placed on the different properties of W. N. Russell. That memorandum was made by me at that time in the presence of those persons from figures given me by Mr. Wilberg in their presence, and on the bank deposit slip of the Scandinavian American Bank. Figures were taken down by me at that time and I have those [208] figures with me and the slip on which they were taken down and I offer that in evidence and ask that it be marked objectors' "Exhibit No. 62."

Mr. CAMPBELL.—There is no objection to that.

Whereupon "Exhibit No. 62" was received in evidence and is in words and figures as follows:

Mdse B T	2384 45
Bldgs	1445 30
R E	385 00
Coal Sheds	350 00
Safe	40 00
Fixtures	20 00
	<hr/>
	4624 75
Merchandise Springdale	448 88
	<hr/>
Coal. B a/c	5073 63

(Back.) Deposit slip, Scandinavian American Bank.

(Testimony of Frank Arnold.)

Cross-examination by Mr. CAMPBELL.

Q. Do you know of your own knowledge that the totals as listed in objectors' "Exhibit No. 62" contains all of the stock of merchandise and real estate which Mr. Wilberg had agreed to buy from Mr. Russell?

A. Not of my own knowledge except the statements that were made at that time in the presence of Mr. Moe and yourself and—by Mr. Wilberg that that was all of the assets of W. N. Russell, including the item which is marked Springdale there, with the exception of about— [209]

Mr. O'CONNOR.—We move to strike out that answer, if the Court please.

The COURT.—Strike it out—all of it?

Mr. O'CONNOR.—It's all hearsay.

The COURT.—Strike it out.

Mr. ARNOLD.—No; I don't know of my own knowledge.

Q. You don't know then of there being some two or three hundred dollars worth of materials and supplies that was not included in the memorandum which Mr. Russell had?

A. I was just going to explain that, and you insisted that I answer the question yes or no. If you want me to explain that, I'll do so.

Q. Well, answer the question.

A. Not of my own personal knowledge, because I never saw it, but I do know of what was discussed at that time. Now, then, I will state that at the time

(Testimony of Frank Arnold.)

that this inventory was presented in the presence of Mr. Moe, in the presence of Mr. Wilberg, in the presence of Mr. Campbell, W. N. Russell, F. E. Russell and myself, it was ascertained that there was some merchandise at Big Timber in a partly constructed building, or in the vicinity of a partly constructed building, to be used in the construction of that building, and Mr. Wilberg estimated that was valued at about \$200. But of my own personal knowledge I know nothing of it.

Q. You were present as you stated at that meeting which was held in the banking rooms of the Scandinavian [210] American Bank, where Mr. Wilberg was present and Mr. Russell, myself and E. J. Moe—I'd like to have you state now what transpired at that meeting with reference to the business of the—of W. N. Russell and of its being taken over by Mr. Wilberg.

A. In what way do you mean?

Q. I'd like to have you tell just what transpired there at that meeting that day in a general way. State, if you want to, what the object of the meeting was that day.

A. Why, yes; I'll tell you what took place then. Mr. Wilberg had an agreement to purchase the assets of the W. N. Russell Company at a given price; pursuant to that agreement he came from Portland to counsel me. It was understood prior to the agreement with Mr. Moe and myself and with Mr. Campbell that when Mr. Wilberg was there ready to close

(Testimony of Frank Arnold.)

the deal, I was to be there and I was to have the account of the McKee Lumber Company which at that time I had for collection. And which had been placed I think at that time into judgment. And it was further understood that the Scandinavian American Bank was to receive out of the moneys paid by Mr. Wilberg the full amount of its indebtedness.

Q. Is that all that transpired at that meeting?

A. Why, I can't tell you every word that was said in detail, because we discussed the business of the W. N. Russell Company pro and con for an hour or an hour and a half. [211]

Q. What else transpired with reference to the closing of the deal between Mr. Wilberg and Mr. Russell?

A. Why, the deal was never closed. You'll have to be a little more definite, Mr. Campbell, and ask your questions and I'll endeavor to answer them for you.

Q. Well, why wasn't the deal closed?

A. Why, because Mr. Wilberg wouldn't come—wouldn't go through with the deal.

Q. And what caused Mr. Wilberg to back down on it?

ARNOLD.—That is objected to on the ground that it is hearsay, calling for the conclusion of the witness and not the best evidence.

The COURT.—Well, it's objectionable further, because it is immaterial. The reason why Mr. Wil-

(Testimony of Frank Arnold.)

berg backed out of it we don't care.

Mr. O'CONNOR.—Supposing he was compelled to back out of it and was partly interested in throwing the man into bankruptcy. That is the objection of the question.

Mr. ARNOLD.—I object to it on the ground that it is immaterial in addition to the other objection.

The COURT.—The objection will be sustained.

To which ruling of the Court, an exception was duly reserved.

Q. Now, Mr. Arnold, as a matter of fact, the understanding which you stated a moment ago, which you said you had with Mr. Moe and myself relative [212] to the claim of the McKee Manufacturing Company—

A. Whatever McKee it was—it was a McKee of some kind.

Q. —was altogether—I was speaking as to the payment of their claim—was altogether and solely an understanding with yourself alone and not with Mr. Moe and myself or any of the officials of the bank.

A. Why, the understanding was with Mr. Moe and with you, representing the Scandinavian American Bank, that you were behind Mr. Wilberg in consummating that deal; and he was to receive the assistance of the bank, and was receiving it, and your assistance, and I understood you were acting also as Mr. Wilberg's attorney, and it was understood that Mr. Wilberg, in the event that he paid for those as-

(Testimony of Frank Arnold.)

sets and that business of W. N. Russell, that the Scandinavian American Bank was to receive every dollar it had coming to it, and taking in the Springdale property, there would be sufficient also to take care of the amount of the account of the McKee Lumber Company.

Q. Now, as a matter of fact, Mr. Arnold, Mr. Moe nor I acting in behalf of the Scandinavian American Bank, nor Mr. Wilberg, never agreed with you prior to the day when that meeting was held nor on that day, to pay the claim of the McKee Company in full.

A. The understanding distinctly was there would be enough out of what he was going to pay for that [213] business taking in the Springdale property also at the valuations that he placed on it; according to the figures that I put down on that slip there would be enough to pay the claim of the McKee Lumber Company as well as the claim of the Scandinavian American Bank. And I was invited down there to that conference to be there when that deal was closed with that very idea in mind.

Q. If you hadn't been there that day the deal would have went through all right—would it not?

Mr. ARNOLD.—That is objected to as calling for the conclusion of the witness and immaterial.

The COURT.—The objection will be sustained.

Q. Just the day before that conference or meeting was held in the bank, you had issued an attachment or an execution on a judgment, which you had obtained for the McKee Lumber Company.

(Testimony of Frank Arnold.)

Mr. ARNOLD.—That is objected to on the ground that it is immaterial.

The COURT.—Objection is sustained on the ground that it is not proper cross-examination and immaterial.

To which ruling of the Court, an exception was duly reserved.

That is all.

Noon recess.

Reconvening, further testimony was received.

Mr. ARNOLD.—The objectors rest. [214]

Testimony of J. Loving, for Petitioner.

Mr. J. LOVING, produced as a witness, having been first duly sworn, upon examination testified as follows:

Direct Examination by Mr. CAMPBELL.

Q. State your name and residence.

A. J. Loving; Big Timber, Montana.

Q. Are you connected in any way in an official capacity or otherwise with the Scandinavian American Bank of Big Timber? A. Cashier.

Q. How long have you held the position of cashier? A. Since the first of the year.

Q. What business were you engaged in prior to that time?

A. Agent for the Northern Pacific Ry. Co. at Big Timber.

Q. What time, if you can tell exactly, did you quit your employment with the Northern Pacific?

A. The first day of February, 1916.

(Testimony of J. Loving.)

Q. Then for a while you were holding the position of cashier of the Scandinavian American Bank and agent of the Northern Pacific? A. I was.

Q. Prior to your election to the office of cashier of the Scandinavian American Bank, were you connected with that institution in any way, and if so what?

A. Why, vice-president in the year 1915. [215]

Q. And prior to that did you have—

A. I was on the board of directors.

Q. During the time you have been connected with the Scandinavian American Bank, do you know of any of the dealings had between that bank and W. N. Russell? A. Some of them; yes, sir.

Q. Do you have any recollection of the loan that was made to W. N. Russell on the 29th day of June, 1915? A. I do.

Q. Were you consulted in regard to the making of that loan at the time it was made? A. I was.

Q. Was there any particular time that you were consulted in regard to that loan?

Mr. ARNOLD.—Wait a moment; that is objected to on the ground that it is incompetent, irrelevant and immaterial. Consulted by whom, and consulted in what way?

Mr. CAMPBELL.—I'll withdraw that question and state it in another way.

Q. Were you present at a meeting of the discount committee of the Scandinavian American Bank that was held on or about the 29th day of June, or just prior to the 29th day of June, at which W. P. Frank-

(Testimony of J. Loving.)

lin and E. J. Moe was present, at which meeting the application of Warren Russell for an additional loan was discussed? A. I was. [216]

Q. What was the nature of that discussion?

Mr. ARNOLD.—Just a moment; that is objected to on the ground that it is incompetent, irrelevant and immaterial, unless W. N. Russell was a party to the discussion, and present at the meeting; self-serving evidence; and anything that the officers of the bank did prior to the making—

Mr. CAMPBELL.—Well, I'll withdraw the question.

Q. Was Mr. W. N. Russell present at that meeting? A. He was.

Q. What was the nature of the discussion that took place at that meeting?

Mr. ARNOLD.—That is objected to unless it is confined to—

Mr. CAMPBELL.—All right.

Q. With regard to the application of Warren Russell for a loan?

A. It was before the discount committee to discuss his condition and see whether we were justified in making him an additional loan.

Q. Do you remember the additional loan that he was asking for at that time?

A. I don't remember the exact amount of the additional loan that he requested.

Q. Have you any recollection of about what amount it was?

A. Well, something like three hundred dollars.

(Testimony of J. Loving.)

Q. What part, if any, did you take in making that loan? [217]

Mr. ARNOLD.—That is objected to on the ground that it is immaterial, what was done not what part he took.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

A. Well, I don't know that I understand just exactly what you mean.

Q. Did you at that time estimate the value of the security which Mr. Russell was offering to give to the bank?

Mr. ARNOLD.—Just a moment, that is objected to on the ground that there has been no foundation laid, the witness hasn't shown himself qualified to make an estimate, and incompetent and immaterial.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

A. I went down and looked through his yards to see how much stock there was.

Mr. ARNOLD.—I move that the answer be stricken out as not responsive to the question.

The COURT.—What was the question?

The question was read to the Court.

The COURT.—Answer the question, yes or no.

A. I did.

The COURT.—Strike the rest out as not responsive.

Q. What recommendations did you make to the

(Testimony of J. Loving.)

discount committee as to the propriety of making
[218] this loan after you had made this estimate?

Mr. ARNOLD.—Just a moment; that is objected to on the ground that it is incompetent and a self-serving declaration; immaterial; no showing being made that any recommendation he did make, was made in the presence of W. N. Russell.

The COURT.—The objection will be sustained.

To which ruling of the Court the bank, by its counsel, then and there duly excepted.

Q. After making that investigation of the security did you make a report to the discount committee?

Mr. ARNOLD.—That is objected to on the ground that it is incompetent, irrelevant and immaterial, unless Mr. Russell was there at the time.

Mr. O'CONNOR.—The question was simply, did he make the report? What difference does that make, whether Russell was there?

Mr. ARNOLD.—Well, I'm objecting to it; let me put my objections in Mr. O'Connor.

The COURT.—There will be no objection to that, the next question will be, What was the report?

Mr. O'CONNOR.—No, no; not that question.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved. A. I did make a report.

Q. Was your report acted upon by the discount
[219] committee, and was Mr. Russell present when the discount committee received this report?

A. I could not say now whether Mr. Russell was

(Testimony of J. Loving.)

present at that time or not when I reported to the discount committee.

Q. Did the committee then act on your report?

Mr. ARNOLD.—That is objected to as incompetent, irrelevant and immaterial.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

A. They did.

Q. What representations did Mr. Russell make to the discount committee of the bank at the time he presented his application to this committee for a loan in regard to security which he had and as to his financial standing at that time?

A. He represented that he had \$5,500 worth of stock, \$5,500 or \$6,000 worth of stock on hand at that time, and this additional money would clean him up and put him in shape so that he would not require any future advances.

Q. Did he tell you then what he expected to use this advance of \$300 or thereabouts for?

A. It was to pay some wholesale dealer, I don't remember who it was.

Q. In making the loans, what is the custom of the bank and banks generally in regard to the amount of security that is taken for loans?

Mr. ARNOLD.—Just a moment. That is objected to [220] on the ground that it is incompetent, irrelevant and immaterial. The custom of banks making loans would have no bearing on this case. The question is, what they did.

(Testimony of J. Loving.)

Mr. CAMPBELL.—If the Court please, there was some testimony at least on the part of the objectors in this case, to the effect that this security that was taken at this time was in excess of what was necessary to secure this loan.

The COURT.—The question in itself as it would be, would be incompetent unless you show that the course of the bank in this particular case was the usual custom of banks and then if your point is for some showing of good faith on the part of the bank—if that is your idea, to show that; there is not anything here, as far as I can see, that attacks the good faith of the bank. You may answer the question if it will show that they followed the usual custom. The question of what is the general custom of making loans among banks would be objectionable.

Mr. ARNOLD.—The idea of showing their general custom, showing the custom of this bank and then calling it a general custom, is too ridiculous to think of.

The COURT.—The objection will be overruled. Answer the question. [221]

To which ruling of the Court, an exception was duly reserved.

The COURT.—Unless it is shown that the custom of the bank—practice—is that of the general custom of banks, then it will be stricken out.

A. It is our custom to loan on 50 per cent of the valuation.

Mr. ARNOLD.—I move that that be stricken out as not responsive to the question.

(Testimony of J. Loving.)

The COURT.—Strike it out.

Q. On what basis does this bank usually make loans?

Mr. ARNOLD.—That is objected to on the ground that it is incompetent, immaterial; custom of this bank may be very nice but that does not have any bearing in this case.

The COURT.—The objection will be overruled. Answer the question.

To which ruling of the Court, an exception was duly reserved.

Q. It is our custom to loan on 50 per cent of the valuation.

Mr. ARNOLD.—I move that that answer be stricken out as not responsive to the question.

The COURT.—The objection will be overruled.

To which ruling of the Court, an exception was duly reserved.

Q. Was the custom of the bank followed in this particular instance? [222]

Mr. ARNOLD.—That is objected to as calling for the conclusion of the witness, and the transaction speaks for itself, and it is a question for the Court to say whether the custom was followed in this particular instance. We don't care about him saying whether it was followed or not. Its the facts we want. Its a question for the Court whether they followed the usual custom. Its very nice for him to say he did.

Mr. O'CONNOR.—He knows whether he did or not.

(Testimony of J. Loving.)

Mr. ARNOLD.—Its for the Court to say whether he did or not.

The COURT.—The objection will be sustained.

To which ruling of the Court, an exception was duly reserved.

That is all.

Cross-examination by Mr. ARNOLD.

Q. Now, you say he made representations as to his security and financial standing at the time of a meeting of this discount committee? A. Yes, sir.

Q. Where was the meeting held?

A. In the banking rooms.

Q. How did you happen to have this meeting?

A. Of the discount committee?

Q. Yes. [223]

It's a custom of the bank in a loan of any size to have a discount committee O. K. the loan.

Q. Well, what would you call a loan of some size?

A. Well, anything about a thousand or \$1,500.

Q. Well, now, as a matter of fact, everything with the exception of \$300 had been all loaned to Mr. Russell at that time—hadn't it?

A. Something like that; yes.

Q. Then all that this committee of your banking institution then had to consider was the additional loan of \$300—isn't that a fact? A. Yes.

Q. The other had already gone. A. Yes.

Q. Now, what was it that called forth this meeting, Mr. Loving? A. It is the custom of the—

Q. Oh, I know, but this particular meeting. That is the custom when making big loans of a thousand

(Testimony of J. Loving.)

dollars or more, but this little loan of \$300, what was it that called for the meeting at this time on this little \$300 loan?

A. The meeting was called to see whether we could loan him that at that time or not.

Q. You were then deviating from the usual custom in this case. It was only big loans that you had the meeting of the discount committee—wasn't it?

A. We have meetings of the discount committee sometimes on a hundred dollar loan,—

Q. Oh, you do? [224]

A. —don't necessarily follow that because we have to O. K. a thousand dollar loan we never O. K. a loan of a hundred dollars.

Q. Well, you remember this meeting particularly, do you? A. Yes.

Q. Do you remember the date of it?

A. Well, possibly it was the day before,—or it might have been that day. It wouldn't be—it will be about the time, the date of the note.

Q. Did you have any statement in writing from Mr. Russell at that time?

A. It was a verbal statement.

Q. Just a verbal statement. Your bank had been doing business with him quite a long while, hadn't it?

A. Yes, sir.

Q. The account hadn't been very satisfactory—had it?

A. Well, no. Not very satisfactory.

Q. And did you have any security at that time?

A. We did.

(Testimony of J. Loving.)

Q. What was the security on?

A. Well, it was on the real estate and on the stock he had.

Q. That was before this transaction— A. Yes.

Q. —of June 29, 1915? A. Yes, sir.

Q. And how long did this meeting at which Mr. [225] Russell was present last?

A. Oh, that is pretty hard to say; but I should judge 40 or 50 minutes; possibly an hour.

Q. Was Mr. Russell present all of the time?

A. Most of the time.

Q. And you went into his financial condition—did you?

A. We had him state his case the best he could; yes, sir.

Q. When you speak of it being "the best he could," he presented no books to you?

A. No, he did not have his books there.

Q. Didn't he given you to understand at that time that he didn't keep any books of account?

A. I don't think so.

Q. You didn't go to see them?

A. We didn't go to see them; no.

Q. The entire or any member of the discount committee, as far as you know?

A. No. Not as far as I know.

Q. Now, did you ask him who his creditors were?

A. We asked him how much he owed, outstanding. That is, how much he owed for lumber he'd received. And material. Lumber.

(Testimony of J. Loving.)

Q. What did he tell you?

A. Something like \$300 he said would clean him up.

Q. Would pay him entirely? A. Yes.

Q. And did you go into this chattel mortgage with him, tell him what he'd have to do. [226]

A. He was told how we'd fix it up.

Q. How you'd fix it up?

A. The only way we could do it.

Q. And did you tell him what he'd have to do when he got this loan, in relation to the chattel mortgage?

A. Well, I don't remember as to that—the specific conditions—what he'd have to do I couldn't say as to that.

Q. That, of course that escaped—that you have no independent recollection of.

A. No; I could not say.

Q. Now, you say your custom is 50 per cent; 50 per cent of what? A. Of the valuation.

Q. Well, its not customary for your bank, is it, to take a chattel mortgage on 50 per cent of the value of a stock of merchandise, of all of the merchandise that he is doing business with?

A. Well, that depends on the merchant.

Q. Well, isn't it an exceptional thing, Mr. Loving, to take a chattel mortgage on a stock of merchandise of your customers? Isn't it the exception and not the rule?

A. Well, it might be considered an exception; yes.

Q. And its only on stress of circumstances, Mr. Loving, when you consider a man's financial condition

(Testimony of J. Loving.)

not good, that you take chattel mortgages on his stock of merchandise? [227]

A. Well, yes.

Q. This chattel mortgage was given so that the bank would be protected and so that Mr. Russell could carry on the business—wasn't it? A. Yes.

Q. And your idea was that he should carry on the business? A. Yes.

Q. Your idea also and your understanding with Mr. Russell was that he was to carry on the business in the same way he'd carried it on, too?

A. Well, I don't know as he was to carry it on in the same way he'd carried it on before.

Q. Well, wasn't that what he did and what you thought he was going to do?

Mr. O'CONNOR.—I object to the question for the reason that it is not proper cross-examination.

Mr. ARNOLD.—If the Court please, they have gone into the good faith,—they have attempted to show the good faith of the bank in executing this mortgage, and they have shown the transaction on that day. Now, I want to show on cross-examination, develop what took place at that time.

The COURT.—They didn't go into the matter of this chattel mortgage at all with this witness.

Mr. O'CONNOR.—Not as to any reports or anything of that kind. Just simply as to the circumstances [228] surrounding its execution only.

Mr. ARNOLD.—For the purpose of showing good faith. Now, then, I want to show by this witness at that time it was never understood that he was to

(Testimony of J. Loving.)

change his manner of conducting his business or anything else.

Mr. O'CONNOR.—That wasn't inquired into at all.

The COURT.—It's not proper cross-examination. It will be necessary for you to put him on as your own witness if you want to bring that out.

Q. Now, Mr. Loving, you've been an officer of the bank during the year 1915—were you?

A. Yes, sir.

Q. What active part did you take in the management of the bank except to act on the discount committee?

A. That was all.

Q. That was all you did?

A. Yes, sir.

Q. As far as you know he continued to carry on the business after June 29 in the same manner that he did prior to June 29, during the year 1915?

Mr. O'CONNOR.—Just a moment; object to that question on the ground that it is not proper cross-examination.

The COURT.—The objection will be sustained. There is no testimony here to show that he knows how he conducted his business after that time, as I take it. [229]

Q. During the year 1915, did you keep in touch with the business of the W. N. Russell Lumber Company, in so far as the bank was interested in it?

Mr. O'CONNOR.—That is objected to as not proper cross-examination.

The COURT.—The objection will be overruled.

(Testimony of J. Loving.)

To which ruling of the Court, an exception was duly reserved.

A. Well, of course, I tried to see what he was doing—how he was getting along.

Q. You knew he was in difficulties, did you?

A. Well,—

Mr. O'CONNOR.—Wait, that is objected to as not proper cross-examination.

The COURT.—You may state whether you know or not, as an officer of the bank.

A. I didn't know of any business difficulties, only that he owed the Scandinavian American Bank—that money.

Q. Was anything said to Mr. Russell at the meeting of the discount committee with reference to his purchasing lumber and merchandise subsequent to the giving of that chattel mortgage?

A. Which chattel mortgage?

Q. This one of June 29th.

A. That, I could not say as to that.

Q. You would not say there was not?

A. I could not say.

I think that is all. [230]

Redirect Examination by Mr. CAMPBELL.

Q. What security, if you know, did the bank have on any money which it had loaned to Mr. Russell prior to June 29, 1915, and which had not been paid up June 29th?

Mr. ARNOLD.—That is objected to on the ground that it is incompetent and immaterial. If there is—

(Testimony of J. Loving.)

Mr. O'CONNOR.—Why, you brought that out yourself.

Mr. ARNOLD.—I did not.

Mr. O'CONNOR.—Why yes, you did. Now, we want to show what mortgages they were.

Mr. ARNOLD.—If we're going into those mortgages then I'm going into the validity of those mortgages. The only thing I asked the witness was with reference to the additional loan of \$300. He said that the discount committee met for the purpose of considering *large* transactions, and this *large* transaction which this discount committee had met and gone into was a measley loan of \$300, because they had loaned everything else up to then, and to bring out the good faith of this committee I ask if they were not—if there was not a previous loan that was secured and that the only loan was \$300.

Mr. O'CONNOR.—The other, the previous loan had been secured by mortgage. You brought [231] that out yourself.

Mr. ARNOLD.—I brought that out on this question of the necessity and the purpose of the meeting of this loan committee.

Mr. O'CONNOR.—That he took a mortgage is not an unusual thing. That the indebtedness, at least part of it, had been secured previously by mortgages, and mortgages become due. Just exactly the same as any bank will take new notes, take new mortgages to secure notes that have been theretofore secured by mortgages, the note and indebtedness secured by the mortgage having become due. To show there

(Testimony of J. Loving.)

It was nothing unusual about it, requiring security at that time, which was the ordinary transaction done in the usual and ordinary way.

The COURT.—Wouldn't be a question of attacking the good faith of the bank in that transaction.

Mr. O'CONNOR.—That is evidently one of the purposes of this hearing, was it a fact that at the time of the execution of this mortgage, the conditions were such that the bank knew he was in financial difficulties and in order to make itself secure, take this mortgage? On the other hand, it seems to me we should be entitled to show the circumstances leading up to the mortgage and show that the debt had been previously [232] secured by other mortgages. Then they were all put together into one large note, everything he had as security was put in there for the payment of the large note.

The COURT.—That is the testimony, the way it stands now. Now, as to what security was covered.

Mr. O'CONNOR.—Exactly, and the nature of the security to show that it was a usual and orderly business-like transaction, instead of a hurried-up affair to get security for a debt that was not likely to be paid, which had theretofore been unsecured, and to get a preference over other creditors, etc.

The question was read.

Mr. ARNOLD.—I make the additional objection that the security in writing is the best evidence.

Mr. O'CONNOR.—They were mortgages, Mr. Arnold. We wish to show this was not a hurried-up affair, and it was not an unusual transaction.

(Testimony of J. Loving.)

The COURT.—I tell you, gentlemen, I cannot see how it can possibly be material at all, in so far as I would be concerned. In considering the matter I would not consider it as material, because I cannot see how it can be. I have taken the position all along that where there is any doubt about [233] it here at all, I've had the—let the evidence go in. If you do not go too far into the matter I will allow the evidence to be considered. But I cannot see for the life of me how it is going to be material. My theory of the case is, gentlemen, there was a deal made——

(After further argument it was said by ——)

The COURT.—The objection will be sustained.

To which ruling of the Court, an exception was duly reserved. [234]

Testimony of E. J. Moe, for Petitioner (Recalled).

E. J. MOE, called as a witness, having been previously duly sworn, upon examination testified as follows:

Direct Examination by Mr. CAMPBELL.

Q. Were you present in the courtroom when Mr. Arnold introduced in evidence checks labeled as exhibits from 1 to 45, I believe, said checks representing payments made by Mr. Russell to various persons? A. I was.

Q. Were all those checks passed on by you when they came into the bank for payment?

A. They were not.

Q. Was the majority of them? A. No, sir.

(Testimony of E. J. Moe.)

Q. There were some, however, were there not, which passed through your hands?

Mr. ARNOLD.—That is objected to on the ground that it is incompetent and indefinite, unless his attention is drawn to the particular checks.

The COURT.—Oh, I don't know what you're trying—what the point is, but go ahead and answer the question.

To which ruling of the Court, an exception was duly reserved.

A. If they were passed through my hands, there were very few of them and I would not be able to say which ones they were. [235]

Q. Now, did any of the checks that passed through your hands, was there any notation or other indication that you could discern from the checks that would indicate to you that the money—the account of Mr. Russell was being dissipated away from the lumber business which he was conducting?

Mr. ARNOLD.—That is objected to on the ground that it calls for a conclusion of the witness. The question is one for the Court, whether it would—whether it had or whether it—

The COURT.—The objection is sustained on the ground of calling for the conclusion of the witness.

To which ruling of the Court, an exception was duly reserved.

Q. Did you have any notice of any kind during the lien of this mortgage that any of the funds derived by Mr. Russell from the proceeds of his

(Testimony of E. J. Moe.)

lumber business were being dissipated or wrongfully used?

Mr. ARNOLD.—Just a moment; that is objected to on the ground that it calls for the conclusion of the witness. The question is one for the Court, whether this witness as an officer of the bank had notice, or whether the funds were dissipated or being wrongfully used—from the evidence.

The COURT.—The objection will be sustained, for this reason, gentlemen. I take it the [236] only question here in dispute is, the only question that would be proper to ask would be his knowledge of any relations of the terms of that mortgage and be specific and state according to the terms of that mortgage whether any money was being paid for any other purpose other than agreed in that mortgage. I think that question pertinent, following this strictly and the mortgage. I don't think it would be fair to say this witness could draw his conclusions as to whether it was unlawfully diverted or otherwise. It seems to me it would be proper that he can state with reference to any moneys that were paid by Mr. Russell contrary to the provisions of the mortgage and confine yourself strictly to those provisions.

Q. Well, do you know of any funds that was paid out by Mr. Russell subsequent to the execution of the chattel mortgage in question that would be contrary to the provisions of the mortgage?

Mr. ARNOLD.—That is objected to on the ground that it is incompetent, irrelevant and immaterial.

(Testimony of E. J. Moe.)

In the first place he hasn't shown that he knows what the provisions of the chattel mortgage are. It calls for the conclusion of the witness on a question of fact, and also on a question of law. [237]

The COURT.—Yes, it's objectionable in that it is calling for the conclusion of the witness.

Mr. O'CONNOR.—Q. You're familiar with the provisions of this mortgage, Mr. Moe?

A. Yes, sir.

Q. According to the terms of the mortgage, he was to pay over to the bank any funds that were left from the proceeds of the sale of his stock and merchandise after deducting the actual and necessary expenses of carrying on said lumber business, actual and necessary living expenses of the party of the first part, Mr. Russell, and after deducting enough to pay bills falling due for goods purchased to replenish said stock under the permission as hereinafter given; and further given the right to buy new supplies of coal, lime, cement, paints, oils, lumber and building materials—

Mr. ARNOLD.—Well, just a moment, I object to the counsel telling the—

Mr. O'CONNOR.—I'm simply reading the provision of the mortgage.

—for cash or its equivalent, to replenish and keep up said stock now on hand. Now, then, do you know of any funds that Mr. Russell received from the sale of any goods that he had on hand after making the deductions that were provided for under the terms of the mortgage?

(Testimony of E. J. Moe.)

Mr. ARNOLD.—That is objected to on the ground that it calls for the conclusion of the [238] witness. It has not been shown that the witness knows of what deductions were made pursuant to the terms of the chattel mortgage. It has not been shown that the witness knows what funds he had on hand. He can't come in here and simply say that he does not know and put a halo of glory around himself and his bank by sitting there and saying he didn't know. The question is what were the acts of these parties. That is a question for the Court. I object because it calls for the conclusion of the witness as to a matter of law, and a conclusion of fact of the witness. It is suggestive, leading, incompetent, irrelevant and immaterial.

The COURT.—Now, gentlemen, Mr. Moe testifies that he is acquainted with the terms of the mortgage, and he testifies that he is acquainted with the way the money was disbursed, going through his bank. Now, the question is, does he know whether there was any money paid out other than was to be paid out under the terms of that mortgage. Isn't that substantially the question?

Mr. O'CONNOR.—The question is, if the Court please, if he knows of any funds that were left after the payment of these various deductions. It's just a little different [239] than your Honor put the question. Then my next question would be if he did know, do you know of his using them for any purposes contrary to the provisions of the mortgage.

The COURT.—The objection will be overruled.

(Testimony of E. J. Moe.)

To which ruling of the Court an exception was duly reserved.

A. There were not.

Q. Then having been no funds, they could not have been applied for other than the provisions of the mortgage?

Mr. ARNOLD.—That is objected to on the ground that it is argumentative. That is a question for the Court.

Mr. O'CONNOR.—It may be leading, but—

Mr. ARNOLD.—It's leading and argumentative.

Mr. O'CONNOR.—I'll change the question.

Q. If there were no funds left after the deductions provided for by the terms of the mortgage, could he have applied any funds contrary to the provisions of the mortgage?

Mr. ARNOLD.—That is objected to on the same ground, that it is leading, suggestive, argumentative and calling for the conclusion of the witness. It's a matter for the Court to pass on. Whether he could or could not.

The COURT.—Well, I think its objectionable. The objection will be sustained. [240]

To which ruling of the Court, an exception was duly reserved.

Cross-examination by Mr. ARNOLD.

Q. When you say there were no funds, you mean there were no funds as far as you know other than what went through the bank—is that it?

A. No funds to be applied on our bank after he

(Testimony of E. J. Moe.)

took care of what he had to pay—his running expenses, etc.

Q. That is what you mean when you answer that question—is it?

A. He had no funds to apply on the mortgage.

Q. You mean after he had disposed of the moneys that went through your bank—

Mr. O'CONNOR.—In accordance with the terms of the mortgage.

Mr. ARNOLD.—Well, let me ask my question. When I ask you to make some additions to my questions, I'll let you know.

Q. —disposing of them, is what you mean by that? After he withdrew the money from your bank, after he did that, then he had no funds to apply.

Mr. O'CONNOR.—That is, according to the terms of the mortgage.

Mr. ARNOLD.—If your Honor please, I object to counsel suggesting and—

Mr. O'CONNOR.—I'm not suggesting anything. You are balling your question up so that the [241] witness don't know what you're driving at.

Mr. ARNOLD.—Well, you let the witness take care of himself.

A. After he withdrew his money he wouldn't have no funds.

Q. There was nothing to apply on your mortgage? That's what you mean?

A. He did not have any after he'd deducted the expense of the yard, purchases, etc.

Q. He did not? A. No, sir.

(Testimony of E. J. Moe.)

Q. How do you know?

A. He stated so a great many times.

Q. That is the only intimation you have about it?

A. Yes.

Q. You're not speaking then—

Mr. O'CONNOR.—Wait a minute and let the witness answer the question.

Mr. ARNOLD.—Well, now, just wait a second and—

Mr. O'CONNOR.—I say let the witness answer the question and quit shaking your finger so until he gets through.

The COURT.—Proceed gentlemen.

The last question and answer was read.

Mr. ARNOLD.—The question has been answered.

Mr. O'CONNOR.—All right. It was my opinion that he had not finished.

Q. You're not speaking of your own personal knowledge then? A. I am. [242]

Q. Where do you get it from?

A. From the books.

Q. From what books, Mr. Moe?

A. From the bank books.

Q. You mean from that ledger account in the bank? A. Yes, sir.

Q. That is all you're speaking from—is that it?

A. Yes, sir.

That is all.

Redirect Examination by Mr. O'CONNOR.

Q. Did you know anything about his system of bookkeeping? A. No.

That is all. [243]

Testimony of W. N. Russell, for Petitioner.

W. N. RUSSELL, called as a witness on behalf of the bank, having previously been duly sworn, upon examination testified as follows:

Direct Examination by Mr. CAMPBELL.

Q. Now, you testified yesterday I think it was, Mr. Russell, that you derived an income from the proceeds and sales of lumber in the yard at Springdale, and that this money was deposited in the bank with the general pot, as you put it. Now, then, I will ask you if you know or can estimate approximately the average net proceeds per month from your sales in the Springdale yard. A. Yes, sir.

Q. About how much per month was derived from that source?

A. I estimated the returns of the Springdale moneys, after expense of running there, would average \$175 a month.

Q. That was net profit then on that yard.

A. No, that was the net returns from the sales after deducting the cost of the handling of it there.

Q. That would be a net proceed then, wouldn't it?

A. No. The cost of the lumber had to come out of that. Other expenses were taken out of that.

Q. Oh, you mean that \$175 a month would be the gross amount after deducting the expenses?

A. Yes, sir. [244]

Q. And approximately then that much each month was deposited in the,—your account in the bank?

A. It was.

Q. From the sales at Springdale? A. It was.

(Testimony of W. N. Russell.)

Q. I want to call your attention to the provision in the mortgage which reads as follows: During the continuance of this mortgage, or the extension thereof, account to the party of the second part for all sales and collections made during the previous month, and pay over to the party of the second part at such times of accounting the proceeds of all such sales and collections, to apply toward the payment of said promissory note, after deducting the actual and necessary expenses of carrying on said business of lumber dealer, and the actual and necessary living expenses of the party of the first part, and after deducting enough to pay bills falling due for goods purchased to replenish said stock under the permission hereinafter given. And I will ask you if you had money left after making the deductions which are provided for in this mortgage. A. No.

Mr. ARNOLD. — Wait a minute. Are you through with your question? I don't know when you're through or whether you're just starting in.

Mr. CAMPBELL.—Well, that's better than going all the time like you do. [245]

Mr. ARNOLD.—Are you through with your question? If so, I ask that the answer be stricken out until I have an opportunity to object.

Mr. O'CONNOR.—Just a minute,—

Mr. CAMPBELL.—I'll supplement the question by adding to it, "Derived from the sales made in your lumber business."

Mr. ARNOLD.—I thought there would be a supplement. I move that the answer be stricken out.

(Testimony of W. N. Russell.)

The COURT.—Yes, strike it out.

The question was read.

Mr. ARNOLD.—Now, I object to the question on the ground that it calls for the conclusion of the witness, is indefinite as to what deductions are referred to; has already been gone into on the previous examination of this witness, and for the further reason that it calls for his legal conclusion and his conclusion as to questions of fact; and for the further reason that the books themselves, or whatever he has got in the way of books, are the best evidence.

The COURT.—I'll say this, gentlemen, I consider that is the exact question we're in dispute over here, that question partly means this: Has he complied with the terms of the mortgage?

Mr. ARNOLD.—It's not for him to say.

Mr. O'CONNOR.—Not necessarily, if the Court please, but did he have anything to comply [246] with the terms of the mortgage with? If he did not have, why, of course, he is not responsible.

The COURT.—I think that it would be incompetent for the witness to state whether he'd applied, or whether he'd had anything— Its certainly a deduction that he's got to draw from the facts. The testimony now is here, gentlemen,—shows his whole course of conduct and whole business affairs all the way through. Testifies as to what he has done. The books are all in evidence, the accounts are all here. That is as far as it could be done to put it before the Court. As it is here now, if you want to ask him what he did as to his system, and what he did, why I

(Testimony of W. N. Russell.)

think that would be admissible, but not—,

Mr. O'CONNOR.—Now, for instance, not interrupting the Court, but taking the fact of living expenses. Who is there to know as to what he used for his living expenses except himself? He may have taken cash out of the drawer and paid some bills. He may have paid them by giving them some merchandise as is frequently done. There is not any one who would know what the deductions are which should be made here for living expenses but himself, and there is no testimony in the record that would [247] assist the Court in determining what he used for living expenses. Of course as to the carrying on of the other business, making the other deductions, I think there is testimony enough to enable the Court to decide that. What is in the case so far to say whether or not that he made proper deductions for living expenses? Don't you think he should be permitted to testify after paying your living expenses and after paying the—keeping up your stock, as you did keep it up, and after paying the expenses of running your business, did you have any funds left upon which to make a payment, with which to make a payment upon this? There is not any one who is in a better position to testify to that fact. That is no conclusion, that is a fact. There is no one in a better position to tell that but the man conducting the business. If he says he did not have and if he says he did have, it doesn't make any difference how he answers the question. Then of course it can be gone into on cross-examination. Its the ultimate fact,

(Testimony of W. N. Russell.)

did he have any funds after making these deductions that were deducted with or without the knowledge of the bank. If there were no funds, if his business did not pay after making the deductions, of course [248] there could not be anything to apply on the note. Who would know that better than the man himself? It seems to me he should be allowed to answer the question. At least it wouldn't do any harm. The Court will at least have his idea about whether or not he had any funds, and will have his idea upon the question of deductions for his living expenses. There's not anything in the record about that yet.

The COURT.—No, I think that it is objectionable. I would suggest this, Mr. O'Connor. If you want to get it so that it can be reviewed, I suggest you make an offer of that proof.

Mr. O'CONNOR.—We want to get the proof in.

The COURT.—If it is appealed, the reviewing Court will say whether the admission was right or wrong, or the exclusion was right or wrong. It strikes me that matter is now all in the evidence, the whole thing in evidence. And now you're asking this man this question after you've covered it all, Did you comply with the terms of the mortgage? Virtually that is the substance of the question.

Mr. O'CONNOR.—Did you have any funds with which to apply on it?

The COURT.—Yes, and did you have any funds with which you could apply? [249]

Mr. O'CONNOR.—Then, if you didn't have, then of course you could not have made a payment with

(Testimony of W. N. Russell.)

something you did not have, and who is in a better position to judge whether or not he did than himself?

The COURT.—He has already stated to us, Mr. O'Connor, just what he did. No, the objection will be sustained.

To which ruling of the Court, an exception was duly reserved.

Q. Did you at any time subsequent to the execution of this chattel mortgage and prior to your failure, spend any money for living expenses that was unnecessary? A. No; not that I know of.

Q. Now, then, during the pendency of the lien of this mortgage and prior to the filing of the petition in bankruptcy, was any suit or suits brought against you on behalf of creditors or by creditors?

Mr. ARNOLD.—Just a moment, that is objected to as incompetent, irrelevant and immaterial.

The COURT.—Just a moment, what did you want to show by that?

Mr. CAMPBELL.—I want to show that he was—

The COURT.—To show that he was—his financial condition was bad, that they were attaching him and all that? If you wanted to go into that—

Mr. O'CONNOR.—We want to show that lots of times [250] solvent people are attached by people who are anxious, perhaps, to make attorney's fees, etc. We want, first, to show that the man in his own judgment was solvent. Second, that people were pouncing onto him and that if he'd been left alone and was conducting the business to-day the creditors would have all gotten their money. Of course he was

(Testimony of W. N. Russell.)

thrown into bankruptcy and the result is that nobody will get their money. By reason of the fact that he was attached and was thrown into bankruptcy.

The COURT.—Well, of course, Mr. O'Connor, you wouldn't urge that that would be material, and competent, to show that if he'd been let alone that he would have gone on and worked out of this. That would be clearly a piece of guess work.

Mr. ARNOLD.—In other words, if he'd been allowed to go on and if he'd been let alone, the bank would have gotten its money and we wouldn't have heard anything about this.

Mr. O'CONNOR.—Other creditors would have gotten their money too, if he had been let alone.

The COURT.—To go into his financial condition you may answer the question.

Mr. ARNOLD.—Just a moment, what is the question?

The question was read to the Court.

Mr. ARNOLD.—That is objected to on the ground that it is incompetent and irrelevant and [251] immaterial. The record itself is the best evidence of—

Mr. O'CONNOR.—He knows whether he was sued or not.

The COURT.—I understood, Mr. Campbell, that your question was—antedated the giving of this mortgage. That was what I had in mind. I supposed—I cannot see that anything that was said after this mortgage was given is material at all. If

(Testimony of W. N. Russell.)

it's after the mortgage, why it don't seem to me to be competent at all. I supposed it was prior to the giving of this mortgage.

Mr. O'CONNOR.—No, we wouldn't be insane enough to show anything of that kind.

The COURT.—My theory of the case would be that that would be immaterial. You can make your offer of proof if you care to. The objection will be sustained to anything that transpired since the giving of the mortgage, showing his financial condition; other than to attack the good faith of the bank, in taking the mortgage, or something of that sort; or unless you show it was done with the actual knowledge of the bank, I don't think any attachment brought since is material at all. If you care to make an offer of proof you may do so and it will be considered on review.

Mr. CAMPBELL.—I think that is all. [252]

Cross-examination by Mr. ARNOLD.

Q. Mr. Russell, with reference to this Springdale business, you simply had this Springdale business as an adjunct to your Big Timber business—didn't you?

A. Well, it was a business in itself.

Q. Yes; but there was no—you did not give your attention to it?

A. Yes. And according to the investment Springdale was the best asset I had.

Q. Oh, it was. You sent merchandise from your yard at Springdale—at Big Timber to Springdale?

A. I shipped in there direct.

Q. And you also shipped from Big Timber, didn't

(Testimony of W. N. Russell.)

you, Mr. Russell? A. I did.

Q. And every thing in the way of bills was sent to your office at Big Timber—wasn't it? All of the charges for merchandise that went to Springdale were charged to you at Big Timber?

A. No, they were not. If a man handling that for me was handling it on a percentage, what I shipped there was charged to Springdale.

Q. Did you keep a separate account with your Springdale business?

A. Yes, sir. We have the slips from Springdale separate from all the rest.

Q. That would be of your sales?

A. Yes, sir. [253]

Q. But you did not keep a separate set of books at Springdale, did you?

A. Well, I keep no books—kept no books at any place. Amongst those packages you have from Springdale I think you will find the freight bills and cost bills of the stuff that went in there. They were always deducted right there at Springdale.

Q. Who run the business at Springdale?

A. William Muir.

Q. He got, did he not, a percentage?

A. Yes, sir.

Q. For running the business? A. Yes, sir.

Q. What was that percentage?

A. Ten per cent.

Q. Of what?

A. Ten cents on the dollar; on the sales.

Q. On his sales. Now, then, all he had to do was

(Testimony of W. N. Russell.)

to account to you for the sales,—wasn't it?

A. No, sir; it was not.

Q. What did he have to do?

A. He had to keep the lumber in order there. See that nothing went to waste, and anything that was shipped he had to take care of it and he paid for it out of Springdale money himself.

Q. He paid for what with Springdale money himself?

A. Anything I shipped him from Big Timber.

Q. In other words, if you sent him material from Big Timber, he sent you the money for it—did he?

A. I—no; he did not send it to me. I went [254] the first of the month, between the first and the 10th, of every month, and we had our accounting then.

Q. And he gave you whatever money he had on hand?

A. Yes. He kept books, he showed by his books what he had paid for and it was taken out of what he had collected for me, on the sales. Of course, what I shipped him was only in the line of doors, windows, paper, and now and then a little lumber; but the lumber end of it there was shipped in direct; in carload lots.

Q. From whom?

A. That was all native stock; from F. E. Russell. Now, then, you did not mean to say, did you, Mr. Russell, that when a carload of this native stock came to Springdale from F. E. Russell, that Mr. Muir mailed to F. E. Russell a check for that carload of lumber?

A. No, sir. I said what I shipped him from Big

(Testimony of W. N. Russell.)

Timber yard he paid for. Whenever a carload come in I had that to take care of.

Q. And the proceeds of the car of lumber would go to you, less ten per cent, when you had your monthly accounting with Mr. Muir? A. It did.

Q. And wherever this carload of lumber came from it would be taken care of in just that way, the payment of it. It would be taken care of by you. He would sell it and at the end of the month the proceeds of the sales would be sent, would be [255] delivered to you less ten per cent for the handling of it? A. Yes, sir.

Q. Now, then, if you delivered or sent any building material of any kind from Big Timber, at the end of the month that would come back to you in the way of the amount less his ten per cent for handling it, wouldn't it? A. Yes, sir.

Q. And that is the way it was handled?

A. Yes, sir

Q. Now, then, when you say that you were in receipt each month of approximately \$175 from Springdale, you mean that that was after the ten per cent was deducted, and after you had footed all the bills or had everything charged to you that had gone to Springdale at Big Timber? A. Yes.

Q. And the merchandise that you sent from Big Timber might be merchandise—would be merchandise that was covered by that chattel mortgage, if it was necessary to send it to Springdale?

A. That would be; yes.

That is all.

Mr. CAMPBELL.—That is all, I believe, we have, your Honor. [256]

E. M. NILES,
Referee in Bankruptcy. [257]

United States of America,
State of Montana,
County of Park,—ss.

**Certificate of Referee in Bankruptcy to Transcript
of Proceedings and Evidence.**

I, E. M. Niles, do hereby certify that I am the duly appointed Referee in Bankruptcy residing in Livingston, Park County, Montana, and that as such referee in Bankruptcy I have had charge of the proceedings in the matter of W. N. Russell, doing business under the name and style of W. N. Russell Lumber Company, and W. N. Russell as an individual; that the foregoing transcript is a full and complete transcript of the proceedings and evidence had in connection therewith.

E. M. NILES,
Referee in Bankruptcy. [258]

[Endorsed]: No. 2016. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of W. N. Russell, Bankrupt. The Scandinavian American Bank of Big Timber, Montana, a Corporation, Petitioner, vs. John G. Ellingson, Trustee for the Bankrupt, W. N. Russell, Doing Business Under the Name of W. N. Russell Lumber Company and W. N. Russell, as an Individual, Respondent. Transcript of Record in Support of Petition for Revision.

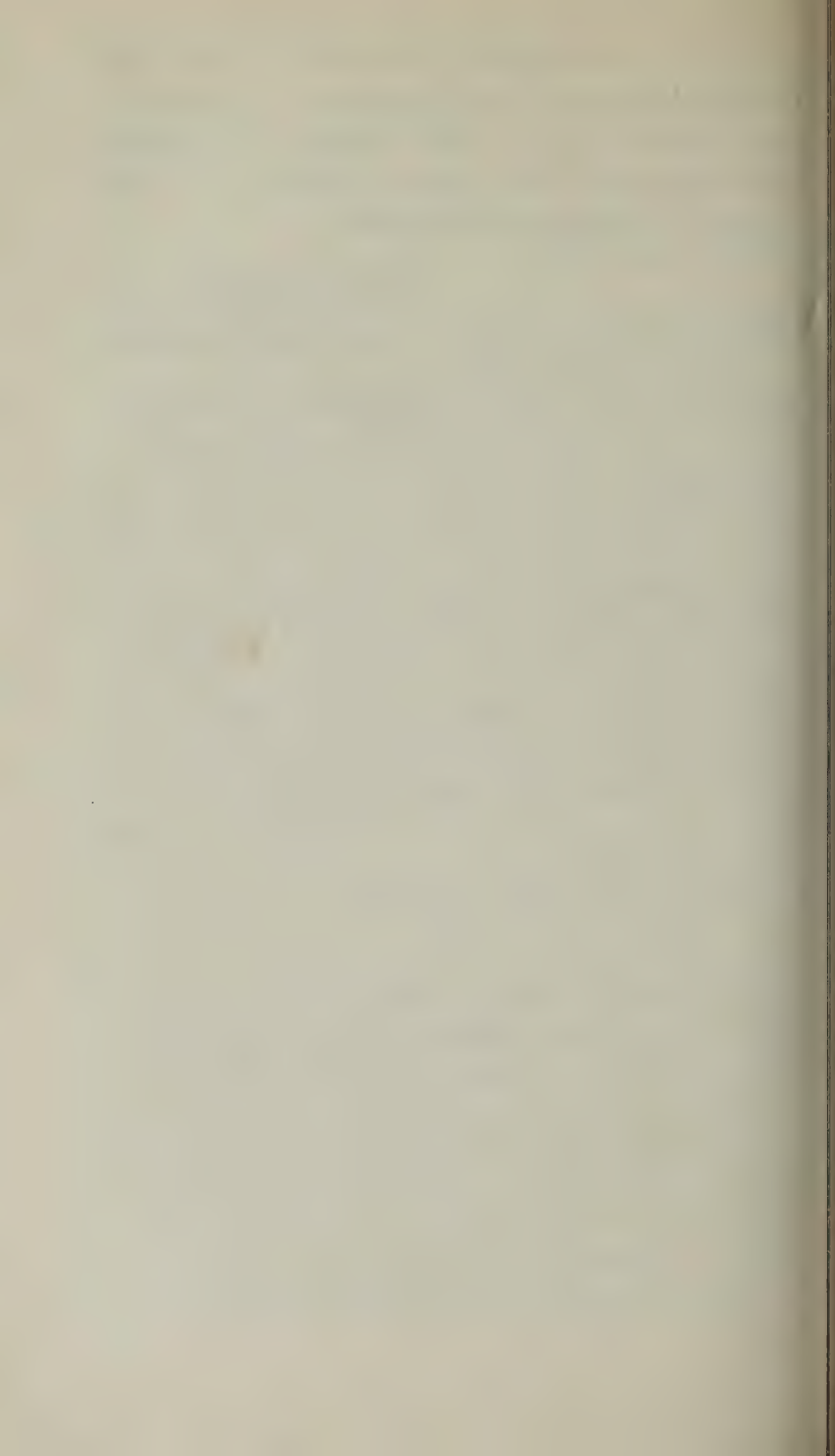
Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in the Matter of Law, a Certain Order of the United States District Court for the District of Montana.

Filed July 3, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



5416

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

in the Matter of W. N. RUSSELL, Bankrupt.
THE SCANDINAVIAN AMERICAN BANK OF BIG
TIMBER, MONTANA, a Corporation,
Petitioner,

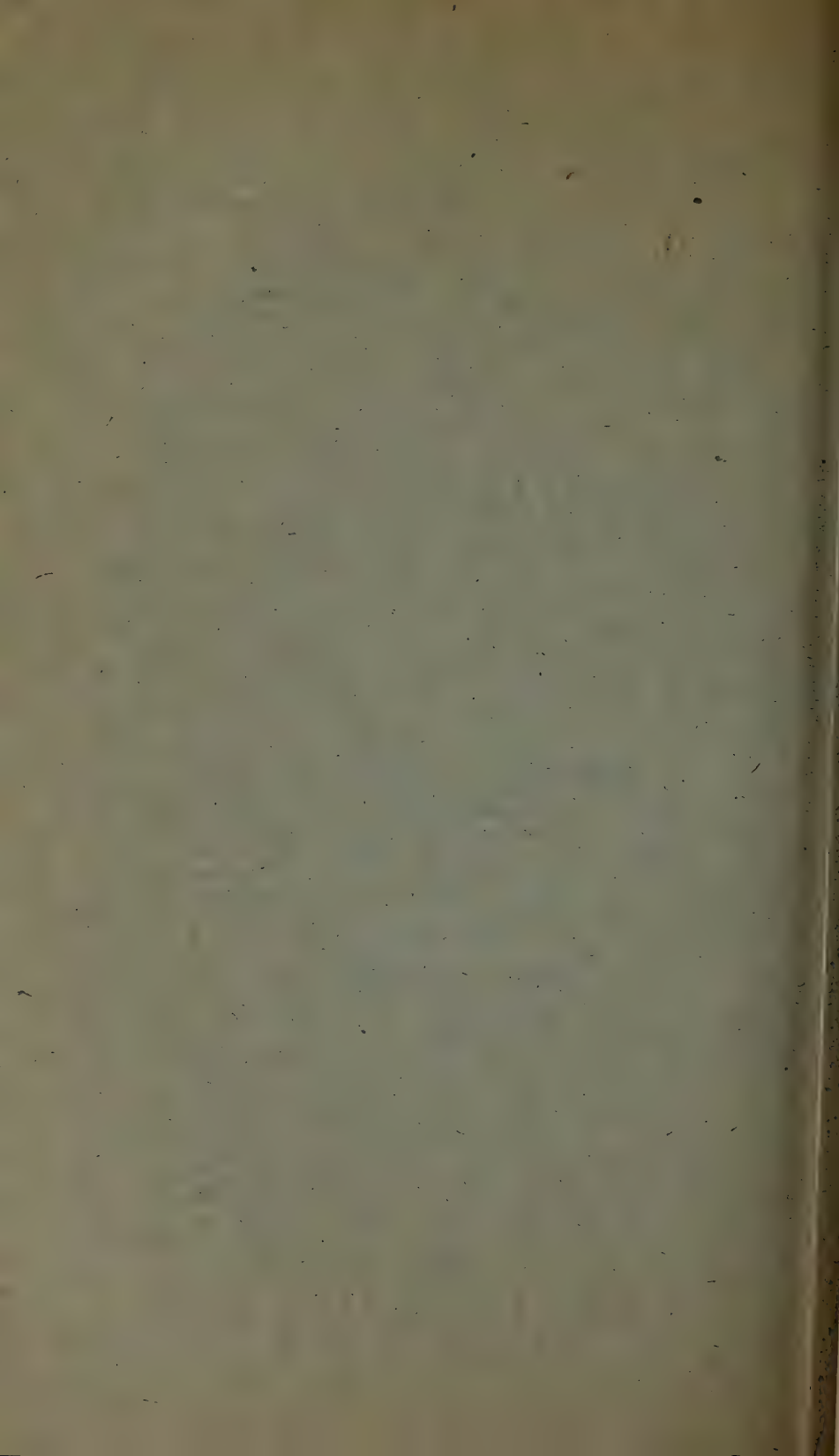
vs.

JOHN G. ELLINGSON, Trustee for the Bankrupt,
W. N. RUSSELL, doing business under the name of
W. N. RUSSELL LUMBER COMPANY, and W. N.
RUSSELL, as an individual,
Respondent,

BRIEF OF PETITIONER.

CHAS. W. CAMPBELL, and
MILLER & O'CONNOR & MILLER,
Attorneys for Petitioner.

FILED
OCT 9 1910
U.S. DIST. CT.
SAN FRANCISCO



United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

in the Matter of W. N. RUSSELL, Bankrupt.

THE SCANDINAVIAN AMERICAN BANK OF BIG
TIMBER, MONTANA, a Corporation,

Petitioner,

vs.

JOHN G. ELLINGSON, Trustee for the Bankrupt,
W. N. RUSSELL, doing business under the name of
W. N. RUSSELL LUMBER COMPANY, and W. N.
RUSSELL, as an individual,

Respondent,

BRIEF OF PETITIONER.

Statement of the case:

On the 29th day of June, 1915, W. N. Russell made and executed a chattel mortgage covering a stock of goods, consisting of coal, lime, cement, paints, oil, lumber and building materials to the Scandinavian American Bank of Big Timber. The mortgage contained a clause to the effect that the mortgagors could sell, in usual course, for cash, or credit not exceeding thirty days; that they would keep accurate accounts of sales and that they could deduct from the proceeds thereof their living expenses, business current expenses and could replenish the stock of goods, and deposit the net, daily, with, and to the credit of, the bank for application to the discharge of the mortgage debt and account monthly to the bank for the

sales and collections of the previous month. The mortgage was given to secure a note in the sum of \$2,790.90, payable to the bank. On the 15th day of March, 1916, Russell was adjudicated bankrupt, and prior to the creditors' meeting the bank filed proof of its preferred claim with the referee in bankruptcy. Thereafter objections were filed on the part of the creditors to the allowance of the bank's claim as a preferred claim. The grounds of objections were: First, that the mortgage was taken by the bank to delay and defraud other creditors of the bankrupt; Second, that the provisions relating to accounting, etc., were not complied with and that by reason thereof the claim should not be allowed as a preferred claim.

A hearing was had upon the objections and they were sustained. An appeal was taken to the Federal Court of Montana and the referee's decision was affirmed. Thereafter this petition to reverse the District Court's judgment was filed in this Court.

ASSIGNMENT OF ERRORS.

1. The Court erred in finding the objections made to the allowance of the bank's claim as a preferred claim sustained by the evidence.

2. The Court erred in finding that the parties intended the mortgage to protect them from interference from other creditors and to shield payments to such creditors as the mortgagee preferred and to keep by additions the stock for the protection of the mortgagee.

3. The Court erred in holding the mortgage in question

invalid.

4. The Court erred in affirming the findings of fact and order made by the referee holding the mortgage invalid.

ARGUMENT.

The mortgage in question was made in good faith to secure the amount named therein. The amount which was secured thereby had been, prior to the execution of the mortgage, loaned to the bankrupt, and when the mortgage in question was taken by the bank it was given as security to renew a debt which had been previously incurred and which had been secured by a mortgage given previous to the one in question. (Trans. p. 64.)

“Mr. Russell had borrowed money from us from time to time, and we had quite a number of notes in the pouch and practically all of them were past due, and knowing Mr. Russell’s condition, that he was owing quite a bit besides what he owed us, we got Mr. Russell in there one day and took a note for the full amount of his indebtedness to us at that time, which was also secured in chattel and real estate mortgage, and told him that we would be willing to carry him for this money; that we would like to see him make out and we would be willing to carry him as long as he kept his stock up in shape and his business was done, and that it was perfectly agreeable to us that he pay off the other creditors, as long as he did not run his stock down and took care of his business.” (Trans. p. 72.)

“Q. This note of \$4,165 was given, was it not, to take up those notes?

A. Yes, it was taken in renewal and he got additional money at that time.

Q. Now, then, did the \$4,165 cover, at the time, the note was given, all of the indebtedness at that time?

A. All with the exception of the note that he had signed with his brother."

As a matter of fact in the testimony referred to, it is very apparent that the bank was attempting to aid the bankrupt in the paying of creditors including it, rather than seeking to delay or defraud other creditors. The real estate mortgage, which was given at the same time to secure the principal sum of \$1830.00 was held by the referee to be a valid and subsisting mortgage and entitled to a place as a preferred claim. This circumstance shows that both mortgages were originally given in good faith.

Chattel mortgages, such as the one in question authorizing the mortgagor to sell his stock of goods in the usual course of business are held valid. *Etheridge vs. Sperry et al*, 139 U. S. 66. 35 Law. Ed. 171.

(Mont. case) Also, *Noyce vs. Ross*, 59 Pac. 369. 47 L. R. A. 400

Thus we find at the outset that the chattel mortgage in question created a valid lien in favor of the bank. Provided, of course, it was not given with intent to hinder, delay or defraud creditors. And the burden of proof is clearly upon the objectors in this case to show that the mortgage was taken in bad faith. There is no evidence in the record supporting this claim.

The most that can be said is that the cashier of the bank (Trans. p. 64.) knew of the condition of the bankrupt and he later says that he did not know the bankrupt was insolvent at the time of the taking of this mortgage. (Trans. p. 81.)

"Q. I will ask you, Mr. Moe, was W. N. Russell insolvent at the time this mortgage of \$4,165 was made?

A. Not to our knowledge."

Of course had the bank known that Russell was bankrupt it would have been the height of foolishness for the bank to take a new mortgage at that time, whereas it already had a valid and subsisting mortgage upon the goods which were given as security for the payment of the notes that were then due. Had the bank known of the insolvency of Russell, would it not then have foreclosed its mortgage on the stock of goods which Russell had? He had insurance upon the same to the amount of \$5,200.00. The bankrupt at that time had assets amounting to \$8,000.00; a six thousand dollar stock of goods and real estate to the value of \$2,000.00. (Trans, p. 81.)

Referring back to the old chattel mortgage there is nothing in record to show that these mortgages had not been given more than four months prior to the time of their renewal by the giving of the chattel mortgage in question.

Speaking of the burden of proof in the case; the rule is laid down in 20 Cyc. 108: "Fraud is never presumed but must be affirmatively proved. On the contrary the presumption, if any, is in favor of innocence; and according to general principles elsewhere discussed, the burden falls on him who asserts fraud, whether he be the plaintiff or defendant, to establish it by proving every material element of the cause of action by a preponderance of the evidence. This rule ~~is~~^{was} laid down as the unanimous support of the cases:

Levy vs. Scott, (Calif. case) 46 Pac. p. 892. Fox

vs. Hale and Norcross Silver Min. Co., et al. 53, Pac. 32.

The latter case uses the following language:

“The burden of proof of the whole issue is still with the plaintiff.”

In *Conrad vs. Nicoll*, 4 Pet. 291, the Supreme Court of the U. S. lays down certain rules as a proof of fraud which have been often followed since; First, actual fraud is not to be presumed; Second, if the act may be attributed to an honest motive equally as to a corrupt practice, the former is preferred. Third, if the person against whom fraud is alleged should be proved to be guilty of it in any number of instances, still if the particular act sought to be avoided be not shown to be tainted with fraud it cannot be affected by the other frauds, unless in some way it be connected with or form a part of them. Numerous decisions might be cited affirming the principles announced by the Supreme Court of the U. S. but we feel it unnecessary to burden this Brief with such citations.

Evidence which give rise to a suspicion of fraud or when it shows merely carelessness or negligence is not sufficient.

Lindsay vs. Kroeger, et al. 95 Pac. 839 (Mont. case.)

The Court says that a contract admittedly valid on its face cannot be avoided by a party to it on the ground of fraud or misrepresentations, except by allegation and proof of facts showing that he had been misled to his prejudice. So it is clear that the bank was not actuated by fraudulent motives either at the time the mortgage was given or later, while the bankrupt, Russell was conducting business under its terms, the latter alternative we will take up later.

In this connection it might be well to call the Court's at-

tention to the presumption which has been written into the Montana Codes; that a given relation which has once been shown to exist will be presumed to continue as long as it is usual with relations of that nature, or until a change has been affirmatively proved. The relations of the parties with reference to good faith originally has never been questioned, referring to the time the loan was originally made. Their relations are said to be fraudulent at the time the chattel mortgage in question was given. If their relations on the beginning were in good faith it would be presumed that their relations would continue to be in good faith as to their creditors, until such presumption was overcome by clear, positive and convincing proof.

Taking up the proposition that Russell did not account to the bank as was provided for in the mortgage:

The Court will observe that under the terms of the mortgage the mortgagor had the right to keep the necessary proceeds to pay current bills, and expenses of carrying on the business of lumber dealing and for making change and his actual and necessary living expenses, and that after such deductions were made if there was any surplus to deposit that in the bank to be applied upon his indebtedness to the bank.

(Trans. p. 318 to 320.)

“Mr. O’Connor.—Q. You’re familiar with the provisions of this mortgage, Mr. Moe?

A. Yes, sir.

Q. According to the terms of the mortgage, he was to pay over to the bank any funds that were left from the pro-

ceeds of the sale of his stock and merchandise after deducting the actual and necessary expenses of carrying on said lumber business, actual and necessary living expenses of the party of the first part, Mr. Russell, and after deducting enough to pay bills falling due for goods purchased to replenish said stock under the permission as hereinafter given; and further given the right to buy new supplies of coal, lime, cement, paints, oils, lumber and building material—Question objected to, but overruled.

A. There were not.

(Trans. p. 321-22.)

Q. There was nothing to apply on your mortgage? That's what you mean?

A. He did not have any after he'd deducted the expense of the yard, purchases, etc.

Q. He did not?

A. No, sir.

Q. How do you know?

A. He stated so a great many times."

Confessedly, if there was nothing left after these deductions were made to deposit with the bank there would be no failure on the part of Russell and the bank to observe the provisions of the mortgage.

It must be borne in mind the bankrupt was engaged in farming, stock raising, doing team work and the lumbering business at Springdale, as well as in Big Timber, and that the proceeds from all of this work and various business were deposited with the money from sales of goods covered by the

mortgage.

(Trans. p. 204-5-6-7.)

In connection with the expenditures of which complaint has been made, namely:

\$55.00 to Utermohl.

\$15.00 to Oliver Typewriter Concern.

\$52.49 concerning an automobile.

\$40.00 for insurance.

\$10.00 for Chautauqua.

\$25.00 paid to Joe Meister.

Will say, that according to the undisputed record these items could not amount to the amount of money received by the bankrupt from sales of live stock, his team work and his ranching, assuming for the sake of argument that these items were not for living expenses or in anywise connected with the lumbering business.

Russell tells the Court that he did not receive enough money from all of his business to run the business.

(Trans. p. 215.)

“Q. Did you deposit to the credit of your individual account all the mōneys which you received in the course of your business with cash or credit sales?

A. Yes, there would be very little exceptions.

Q. What were those exceptions?

A. A bill of five dollars or less, oftentimes paid out in cash from cash received, but the greater portion of this money was turned in to the bank to be checked out. Any money received, though, went back into the business.

Q. What were those small sums paid out for?

A. Well, living expenses; there was small sums paid out

right along for those. And now and then a hired man probably worked a day or two days. And such things as that.

Q. Were all these sums paid out necessary incidentals of the business and of your living expenses?

A. Yes, sir.

Q. Did you at any time between the 29th day of June, 1915, and the time when the petition in bankruptcy was filed, have any profits from this business in excess of your necessary living expenses and then the expenses incident to the running of your business?

A. No, I didn't have enough to run the business.

Q. Then, you did not have at any time during the continuance of the loan—of this mortgage, any moneys which you could apply on your notes to the bank?

A. I did not.

Q. Did you at any time during the continuance of this mortgage tell the cashier or any other officer of the bank that fact?

A. Yes, sir.

Q. When and how many times, if you know?

A. Well, at least twice a month. They would generally ask me when I was making deposits. Of course I generally had a place for it, a bill to be paid, when the money was deposited.

Q. You made verbal representations then to the bank or its officers, at least twice a month?

A. Yes, at least that.

Q. Weren't there several times also when you were in the bank, and oftener than twice a month, when you made verbal

reports of the status of your business.

A. Yes, sir.

Q. Did you tell them at any time the exact amount of money that you were owing prior to the first day of February, 1916?

A. No; I do not really believe I ever run the entire indebtedness up together myself. For myself.

Q. Then you did not know yourself how much you were in debt?

A. Not to a cent.

Q. As a matter of fact, under the system of bookkeeping or accounting which you had there, was it possible for you to have made better accounts to the bank from what you did?

A. No, sir.

Q. Did you ever turn any money into the bank you'd applied on your \$4,165 note?

A. No, sir.

Q. Did you on any other notes after that?

A. Yes, sir."

So it is clearly established that no money was received by Russell in excess over and above the deductions. The mortgage authorizes him to take out of his business these expenses and if this is the situation there were no proceeds improperly applied or used by Russell, with the consent of the bank or otherwise, that should have been paid upon the principal of the note secured by the mortgage, consequently no failure in the terms of the mortgage has been shown in this respect.

WITH REFERENCE TO THE ACCOUNTING
FEATURE:

Statements were made by Russell to the bank as to his condition at least twice a month. (Trans. p. 215 to 217.)

(Trans. p. 228-29.)

“Q. Did Mr. Moe ever ask you what you were doing with the money taken in every day and the profits of your business?

A. Yes, sir.

Q. Where did you tell him they were going to?

A. I told him it was taking all that was coming in to keep up my stock and keep going, which it was doing. I was holding out too much credit which I found out afterwards was impossible to do, and he told me so at the time.

Q. When did he tell you that?

A. Probably once or twice every month when he thought I should be advised to back off on giving so much credit a little bit.”

Some point was made in the Court below as to Russell's selling goods on credit. We have his statement on page 229 of the transcript to that effect. As a matter of fact he made it a point never to give a man over 30 days credit, and as he found out 30 days meant anywhere from 30 days to never, and this is an emphatic statement by Russell himself, that he did not sell goods on credit for a greater time than 30 days. (Trans. p. 229.) His testimony was not contradicted in any way. An attempt was made by reference to the accounts kept on the McCaskey Register to show that Russell gave credit for

indifinite terms, yet these accounts show nothing of the kind, from all the books introduced in evidence at the hearing it is shown clearly that Russell's bills receivable were payable to him monthly. This is ordinary business usage and accordingly any sales not for cash but silent as to the terms of payment cannot be construed otherwise than as a sale on credit until the first of the next month. To support this well established rule there is no need to cite at length from authority.

Cyc. Vol. 12, 1077, lays down this rule.

"So where there is no express contract the time of delivery, the time of credit, the time of payment and what shall be considered as a payment may be regulated by usage." No agreement on the part of Russell to extend the time of payment for more than 30 days was shown. The evidence does show attempts to compromise bad debts and to arrange for the payment of other accounts by delinquents who had defaulted, but this was good business and the evidence does not show a single case where an account which could have been collected sooner was carried for more than 30 days. The accounts which were carried are simply incidents of bad debts unavoidably incurred in the course of trade.

Russell's customers promised to pay within 30 days. The sales were made upon his reliance upon these promises. The subsequent default was no part of the credit given. Neither the bankrupt nor the bank can be blamed for their delinquency. Yet it is solely because of such defaults which occur in every business that the McCaskey register shows the uncollected balance complained of.

Any business operating on the same scale as was Russell's would show a similar total of bad debts at the end of eight months business and any authority to carry on business whether contained in a chattel mortgage, power of attorney or corporation charter was never given with the understanding that the business so authorized should be conducted entirely without the accumulation of bills receivable. It is a well known fact that all people do not pay their debts. Yet to hold Russell and the Bank accountable for every customer to whom he had in good faith extended credit within the terms of the mortgage, but who, for some reason best known to recalcitrant debtors, had refused to pay in accordance with his promise is to make the bank an insurer of the credit of every person with whom Russell dealt. This was not the intention of the parties as expressed in the mortgage. Again, if credit was extended beyond the 30 days, which was not the fact, the evidence does not show that the bank was a fraudulent party thereto.

The Circuit Court of Kansas in the case of Atchison Saddle Co. vs. Gray, 64 Pac. 987, says:

"That even tho proceeds were used in violation of the terms of the mortgage, such violation without the knowledge or consent of the mortgagee would not make void the mortgage as to it."

Also see, Howard vs. Wulfekuhler, 13 Pac. 566.

The case at bar cannot be distinguished from the Gray case except that in the Gray case the plaintiff carried on business at some distance from where the mortgagor lived, whereas in the case at bar, the bank and Russell were located in the same town.

An examination of the records of the transcript in this case will clearly reveal the fact that Russell kept a very imperfect record of his transactions and that it would be next to impossible for the bank to get information relative to his credits, etc.

In this connection the bank had a right to assume that Russell was carrying out his agreement and it was not incumbent upon the bank to install a new system of bookkeeping for Russell or to place an agent on the grounds to supervise the transactions. There was never, in the usual course of business in Big Timber, any suspicious incidents brought to their attention to lead the bank to infer that Russell was breaking his agreement, and it is doubly sufficient that nothing has been brought to light since and have been specifically pointed out by the attorney for the objectors.

Going back to the accounting feature:

The law does not require a formal statement of ones dealing to constitute an accounting. An accounting is defined in 1. C. J. 596, to be

“A detailed statement of items of debt and credit arising out of contract or some fiduciary relation. To constitute an account there must be a detailed statement of the various items and there must be something which will furnish to the person having a right thereto, information which will enable him to make some reasonable test of its accuracy and honesty. It is accordingly insufficient merely to state a general balance. The particular mode of keeping the account, whether on books or loose scraps of paper, or without any written charges, or whether it is all kept in one shape or in different form, is unimportant.”

This definition is based principally upon the law as laid

down by the Calif. Supreme Court, in the case of Millet vs. Bradbury. 109 Calif. 170.

It is admitted that Russell deposited the proceeds of his sales charged to his individual account with the bank. It is admitted that the money which Russell paid out in the course of his business was spent by means of checks drawn on his account. From this source of information it follows that the bank was able at all times to determine the financial standing of the bankrupt. The monthly balance showed every 30 days exactly where the business stood in receipts and expenditures, and according to the testimony heretofore quoted, the cashier of the bank several times a month would ask Russell how he was getting along, etc., which testimony the bankrupt admitted. (Trans. p. 216.)

The system used by Russell, namely the McCaskey system showed the accounts which Russell was carrying on the books, the volume of cash sales and collections, the withdrawals and expenditures of the business. If due consideration is had for substance and not for form, how could a formal statement, which counsel seems to think is demanded each month by Russell, have given the bank any more information than it already had. Could a detailed report by Russell have been better than checks and deposits from which the report would have had to be made? Russell testified that the only record he kept of the money he paid out was upon the stubs of his check book and by means of his cancelled checks. (Trans. p. 90.)

“Q. Did they ever ask you what your sales had been for

any particular month? How much paid out and collected and did you tell them?

A. Yes.

Q. Where did you get the figures from?

A. My check-book always showed what I was paying out.

Q. Now, then, did you keep any other books except your check-book as to what you were paying out?

A. No."

Could Russell's written conclusions have been better or more reliable than the information covered by the conferences by him and the bank officers, taking into consideration the fact that Russell was not a bookkeeper or accountant, that he was not schooled in figures or auditing and that he was not competent to draw up an account of his assets and liabilities, showing his costs, over-head expenses, profits and losses with the details required in the usual financial statement. Is it not enough that he put all receipts on record at the bank and made all expenditures by checks drawn thereon from which any business man accustomed to such matters could draw an accurate conclusion. The officers of the bank knew all along that Russell was not paying expenses, and the accuracy of their knowledge is plainly evidenced by the present proceedings in bankruptcy, a situation peculiar to gentlemen ^{and} ~~in~~ industries which do not pay expenses. With every deposit and withdrawal at the bank Russell was accounting to the party of the second part for all sales and collections. He was furnishing them with a detailed statement of items of debit and credit. He was providing them with a form which would enable them to make some

reasonable test of its accuracy and he was accounting every day for the proceeds of his business. He was keeping fully within the spirit of his agreement. Nothing which a formal statement by him would have shown was concealed. If Russell had practiced fraud a detailed report made out by him certainly would not show it. Detection could only have come from the other records which the bank constantly had before it. The fact that the records did not appear to have been kept by Russell in some particular mode is entirely immaterial.

Complaint was made in the Court below that large sums of money were deposited in the bank but none of it was applied on the mortgage debts. But the fact was overlooked that expenses had to be met; that the stock of goods had to be replenished; that the mortgagor had to live, all of which he had a right to do under the terms of the mortgage, and the fact was also likewise overlooked that there was never anything left, after deductions were made with which to reduce the mortgage indebtedness.

Russell being insolvent and a bankrupt shows that the business was not profitable. Had there been a surplus at any time after the expenses were deducted, Russell would not have become a bankrupt.

By reason of the relations of the continuous accounting between the bank and Russell, the bank knew there was no profit and nothing to apply to the satisfaction of the mortgage indebtedness.

The only inevitable conclusion to be drawn from the evidence^{is} that from the moment that the mortgage was given to the

date of the filing of the petition in bankruptcy Russell did not have one penny of profit to apply on the mortgage debt, and because of the fact that the bank knew of this condition, no deposit of the proceeds of such sales of the mortgagee herein to the credit of the party of the second part to apply on the note hereinafter mentioned, was ever made. There was never any surplus to apply. Russell's receipts from day to day and more were covered by his debts. These had to be met in part at least or go out of business.

Except the items that are mentioned in this Brief, every single dollar paid out by Russell was used to take up an honest debt. No court has ever before said that the payment of a just debt is fraud upon anyone; and the burden of proof is on the objectors to show that the provisions of the mortgage were violated, respecting the paying out of money which burden was not met by the objectors.

Exhibits from one to thirty-six are evidence of debts paid by the bankrupt, which were authorized under the terms of the mortgage. Had these bills not been paid, creditors would have then brought suits. The bank by the terms of the mortgage waived its lien to the receipts to this extent. To continue in business Russell must buy and sell, and in order to buy he must pay previous bills. Some of the bills he paid were incurred prior to the execution of the mortgage. Russell's debts before the mortgage continued to be Russell's debts after the mortgage. They were still the liabilities of the business. The mortgagee did not try to and could not have suspended payment of the debts incurred prior to June 29th, 1915. Failure to pay

for a car load of lumber sold to him on June 25th before the mortgage would have the same result as failure to pay for a car on July 5th after the mortgage. In either case he could not continue to buy unless he paid and if he could not buy he could not sell. But if this problem is viewed from another angle, it is difficult to see how these payments could prejudice the other creditors, who, but for them would have received nothing, and who are through the trustee objecting to the allowance of the bank's lien as a preferred claim, and are the people who received payments upon bills.

Counsel contention amounts to this: the mortgage in question would have been valid if the conditions thereof had been observed and if a formal statement had been rendered, which under the circumstances would not have benefited the bank nor the creditors. And again, if the formal statement had been rendered and these payments that have been objected to were paid to the bank, the bank would have then taken all of the assets of the business and the objecting creditors, who have already received payments and who are now objecting to this preferred line, through their trustee, would have received nothing, and because the bank allowed the mortgagor to pay some of these creditors contrary to the trustee's interpretation of the terms of the mortgage, and instead of taking all of the proceeds itself, it thereby committed fraud which should vitiate the whole mortgage lien. Had the bank played "whole hog" and given the general creditors nothing it's security would have been good. But by dividing between them the income of the business in order to keep Russell on his feet

and his business going the bank has been guilty of fraud, which subjects it to the penalty of giving the general creditors all that is left. By giving to these objectors nothing, the bank would have protected itself; by giving them pro rata payments from time to time in preference to its own debt it is thereby contended that the bank has lost all. Such an argument needs but to be stated to be refuted.

Further these payments referred to above to the creditors from whom Russell bought his supplies and his stock in trade and who would have stopped his business if he had not paid were made in strict conformity to the provisions of the chattel mortgage requiring that Russell should not let the value of his lumber and materials fall below a certain figure. Had the bank interfered and attempted to convert any of this money to the payment of their own claim there would have been room to cry fraud. The concerns who did sell to Russell when he was the owner of a six thousand dollar lumber business prior to June 29th, 1915, would have found after that date the entire assets of the business diverted to another and subsequently accruing claim.

Under those circumstances the objectors would holler fraud exactly as they are now arguing. Yet these same objectors are the very persons who benefited by the payments under the mortgage, which they are now questioning. Even if there had been fraudulent practice in this case, these creditors who have received the benefit thereof are in no position to raise the question. It is a familiar principle of equity in bankruptcy courts that one who alleges fraud and demands equity must himself use equity and deal with clean hands.

Every cent of the sum covered by the mortgage the bank paid Russell and he to the creditors. These creditors now appear in this case, represented by the trustee to object to the validity of the bank's security, while they hold in one hand the proceeds of the loan obtained from the bank by virtue of that security, while with the other they demand the security itself. A plainer case of equitable estoppel cannot be stated. Admitting every contention of the objectors to be true still the facts show that the objectors with full knowledge of the mortgage which was of record in Sweet Grass County, shared in every payment made in alleged violation of its terms. To such as these it is submitted the doors of this Court ought to be closed.

It may be contended that it would be in violation of the terms of the mortgage for Russell to have purchased merchandise on credit, but the concerns appearing here, through the trustee are the ones which allowed Russell credit and they certainly cannot set up as a violation of the terms of the mortgage which was on record, their own act and declare that by their own act they have been defrauded. The recording of the chattel mortgage was notice to these people. They cannot assist in the violation of the terms of a mortgage and then claim that by reason thereof they have been defrauded. By this means these creditors and objectors have been wilfull contributors to the alleged fraud which ought to put these parties beyond the jurisdiction of this court in this case. But even though the terms of the mortgage were violated in this respect it would not invalidate the mortgage unless the officers of the bank had notice and the record shows no such notice.

It is submitted on behalf of the bank that the objectors to the validity of its loan have failed to show a single instance of fraud on the part of the bank in the entire transaction and everything complained of may very easily be explained as a result of a desire to help the bankrupt continue his business.

The objectors who come into court here and complain of the bank's loan are the creditors who have shared the fruit of the loan made by the bank under the mortgage. It's alleged breach of its terms has been at their instance and solicitation. It is they who have shared every penny of the money taken in by Russell in the conduct of his business and from his teams and his farm and from the sale of his live stock. They took no steps to protect their own interest, they gave no notice to the bank and other creditors. The mortgage is recorded in Big Timber at a distance of less than 300 yards from the lumber yard run by Russell. If the bank in good faith has advanced money to Russell to keep his business going for some eight months these creditors have thrown him into bankruptcy and by so doing ended their chances of receiving payment in full. Yet they now ask the bank to hold the sack. They have taken all the proceeds of the business that they could reach with one hand, with the other they now ask a court of equity and good conscience to give them what is by right the bank's security. They make no offer of restitution; give no explanation for their own participation in the breach of the mortgage conditions, which they allege. If there ever was a case where clean hands are imperatively demanded in a Court of equity, this contest is one.

It is respectfully submitted that the objectors have failed to prove their allegations of fraud. That their own acts and statements have estopped them from questioning the mortgage and that the bank has proved its good faith in this matter and the consequent validity of its lien. Upon these grounds this court is respectfully asked to reverse the judgment of the District Court in Montana, and to sustain the validity of the chattel mortgage.

Respectfully submitted,

CHAS. W. CAMPBELL, and
MILLER & O'CONNOR & MILLER,
Attorneys for Petitioner.

Due, legal and timely service of the foregoing brief and receipt of a true copy, is hereby acknowledged this..... day of October, 1917.

Attorney for Trustee.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

In the Matter of W. N. RUSSELL, Bankrupt.
THE SCANDINAVIAN AMERICAN BANK, OF BIG
TIMBER, MONTANA, a Corporation,
Petitioner,

vs.

JOHN G. ELLINGSON, Trustee for the Bankrupt,
W. N. RUSSELL, Doing Business Under the Name
of W. N. RUSSELL LUMBER COMPANY, and
W. N. RUSSELL, as an Individual,
Respondent,

BRIEF OF RESPONDENT.

FILED

OCT 15 1917

F. O. M. C. C.

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BRIEF OF RESPONDENT.

A motion has been interposed to dismiss the petition to review herein upon the following grounds:

1. That the record is not certified to by the Clerk of the United States District Court for the District of Montana as required by Subdivision 1 of Rule 14, of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit.

2. That the transcript of the evidence in the record has not been settled in a bill of exceptions and has not been certified to by the Clerk of the District Court for the District of Montana as a correct copy of the transcript of the evidence on file in the office of the Clerk of the District Court for the District of Montana, and which was reviewed by the Hon. George M. Bourquin, Judge of said Court.

3. That no application has been made to the Circuit Court of Appeals of the Ninth Circuit, or a Judge thereof, for an allowance of the petition for revision herein, and no notice of the serving and filing of such petition has been served herein.

4. That the petition for review herein has not been allowed by the United States Circuit Court of Appeals for the Ninth Circuit, or any Judge thereof.

5. That no citation was issued by the Circuit Court of Appeals herein to the District Court of the United States for the District of Montana, or to the Clerk thereof, to return a true copy of the record in the District Court of the United States for the District of Montana herein, under his hand and the seal of the said Court, or at all, and no such record has been filed herein.

6. That no bond has been filed herein by petitioner.

7. That it appears from the record that the order of the United States District Court for the District of

Montana should be reviewed by appeal under Section 25-a, of the Bankruptcy Act, and not by petition to revise under Section 24-B, of the Bankruptcy Act.

WE WILL TAKE UP THE SEVERAL GROUNDS
FOR THE MOTION TO DISMISS IN THE
ORDER IN WHICH THEY ARE MADE.

1. There appears to be no rules of the Ninth Circuit Court of Appeals with particular reference to petitions to review under the Bankruptcy Act. General rules, therefore, are applicable.

The petition filed herein is the original petition served on Counsel for the Respondent. It contains certain of the papers used on the hearing before the Referee and before the District Court for the District of Montana, attached to the petition to review as exhibits. It does not even contain the proof of claim of the Scandinavian American Bank, the Petitioner. And the exhibits attached to the petition to review are not even certified to as correct copies of the originals in the office of the Clerk of the United States District Court for the District of Montana.

The Rules of the Circuit Court of Appeals Require:

Rule 14, of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit.

2. The transcript of the evidence is not settled in a Bill of Exceptions and has not been certified to by the Clerk of the District Court for the District of Montana as a correct transcript of the evidence.

The evidence used before the Referee and in the District Court is not even made a part of the petition to review filed and served in this case, and the record does not show and the transcript of the evidence was never served upon respondent or its counsel. There is nothing to show

that this transcript of the evidence is a correct copy of the evidence passed upon by the Referee or by the District Court.

Even if we assume that the certificate of the Referee as it appears in the uncertified transcript (Tr. 334) was an original certificate by the Referee, that would be insufficient.

Appeals to the Circuit Court of Appeals are regulated by the Act of Congress of February 13, 1911, Chapter 47.

It requires the transcript to be certified to by the Clerk of the lower Court.

The petition and the requirements upon appeals in bankruptcy cases are substantially the same as in other cases, and the record required to be certified and filed in such cases is the record of the case in the Bankruptcy Court.

"The District Courts in the several Districts of the United States are by law the Courts of Bankruptcy * * * the Clerk of the District Court being also a Clerk of the Bankruptcy Court can alone, therefore, certify to the Appellate Court the proceedings had in a bankruptcy case, either on appeal or on petition to superintend and revise. He, and he alone, has the authorized seal of the Court."

Cook Inlet Coal Fields Co. vs. Caldwell, 17 Am. B. R. 135.

Hegner vs. American Trust & Savings Banks, 26 Am. B. R. 571.

Rule 14, Rules of the United States Circuit Court of Appeals for the Ninth Circuit, subdivisions 1 & 2, 3, 4 and 5. The record does not show that any application was made for the allowance of the petition for revision, or that it was allowed, and it does not show that a citation was issued by the Circuit Court of Appeals to the District Court of the United States for the District of

Montana, or to the Clerk thereof. This certainly is the correct practice under Rule 14 of the Rules of the Circuit Court of Appeals of the Ninth Circuit, subdivisions 1, 2 and 5.

"The several Circuit Courts of Appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy, within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

Section 24 of the Bankruptcy Act, Subdivision B.

"Appeals from a Court of Bankruptcy to a Circuit Court of Appeals * * * shall be allowed by the Judge of the Court appealed from, or of the Court appealed to, and shall be regulated, except as otherwise provided in the Act, by the rules governing the appeals in equity in the Courts of the United States." Rule 36, General Orders in Bankruptcy.

In re D. Abraham, 93 Fed. 767, 2 Am. B. R. 266.

6. No bond has been filed herein.

Rule 13, Rules of the Circuit Court of Appeals of the Ninth Circuit.

7. The petition in this case is entitled "A Petition for Revision and Review in Section 24-b of the Bankruptcy Act of 1898. (Tr. 1.)

The petition, however, (Tr. 3-4) shows clearly that petitioner seeks not only to "revise in matter of law", but also to review the evidence; and the petitioner alleges that the evidence is insufficient to justify the order of the District Court. It is apparent therefore, that the matter should be reviewed by appeal under Section 25-a of the Bankruptcy Act.

It will probably be contended by petitioner that under the Bankruptcy Act this petition may be treated as a petition to revise under Subdivision B of Section 24 of the

Bankruptcy Act, or as an appeal under subdivision A of Section 25 of the Bankruptcy Act; and that even if the time within which to file the appeal under subdivision A of Section 25 of the Bankruptcy Act has expired, or was not taken in time, they are still entitled to review of the Order under subdivision B of Section 24, of the Bankruptcy Act.

Whatever difference of opinion or divergence of views there may be in the rules of the Circuits as to this question and the construction to be placed upon Sections 24b and 25-a of the Bankruptcy Act, we think that the matter has been determined and set at rest in this Circuit, and also by the United States Supreme Court.

It is to be borne in mind that the power to superintend and revise under Subdivision B of Section 24 is confined to matters of law, and that the right of appeal under Section 25, subdivision A, reviews both questions of law and fact.

The right of appeal under subdivision A of Section 25 in particular covers three cases: "1. From a judgment adjudging or refusing to adjudge the defendant a bankrupt. 2. From a judgment granting or denying the discharge. 3. From a judgment allowing or rejecting a debt or claim of \$500 or over."

1. This appeal is an appeal from the rejection of a claim as a preferred claim and necessarily comes within the third subdivision of the subsection.

In the case of *Morehouse vs. Pacific Hardware and Steel Company*, reported in 24 Am. B. R. on page 178, 177 Fed. 337, Circuit Judge Gilbert, speaking for the Circuit Court of Appeals of the Ninth Circuit, discussing these two sections of the Bankruptcy Act says:

It is conceivable that the line of demarcation

between "proceedings in bankruptcy" and controversies at law and in equity, arising "in the course of bankruptcy proceedings," may in some cases be obscure; but, generally speaking, the former include all questions arising in the administration of the bankrupt's estate, such as the appointment of receivers and trustees, orders requiring the bankrupt to surrender property of the estate in bankruptcy, orders requiring the bankrupt's voluntary assignee to surrender property of the estate, orders giving priority to the claim of a creditor, orders directing a set-off of mutual debts, and orders confirming the composition. These are questions which with a view to the prompt administration and distribution of the assets of the bankrupt, the law permits to be summarily disposed of by revision. The latter include all controversies and questions arising between the trustee and adverse claimants of property as property of the estate, whether the property be in his possession or theirs.

Collier on Bankruptcy 10th Edition on page 521 says:

Petitions to revise in matter of law divides with appeals in equity cases the great majority of reviews heard by the circuit court of appeals. The petition differs from such appeals in two important particulars. (1) Petitions to revise bring up questions of law only; appeals both of law and of facts. (2) The former calls up any order or judgment or judicial action in bankruptcy proceedings; the latter three classes of final judgments only. The provisions as to revision in matter of law and appeals were framed and must be construed in view of the distinction between steps in bankruptcy proceedings proper and controversies arising out of the settlement of the estates of bankrupts. In other words, if the question arises in an independent suit to determine a claim necessary for the settlement of the estate, or if it arise in one of the cases specified in Par. 25a, review may be had by appeal; if the question pertain to the bankruptcy proceedings and arise therein review may be had by a petition to revise in matter of law.

The same author on page 522 says:

It has been held that the power to review by appeal conferred by Par. 25a and that to supervise granted by Sec. 25b are cumulative; that the two grants of power are not inconsistent and that in a proper case either may be invoked. There are a number of other cases in which it has been held that where an appeal might be brought under Sec. 25 a review of petition under Sec. 24b was not available. In many of these cases a distinction is made between "proceedings in bankruptcy" under Sec. 24b and "controversies arising in bankruptcy proceedings" which are appealable under the general appellate jurisdiction of the court as conferred by Sec. 24a. Under the principles of these cases if the controversy is one arising in bankruptcy proceedings, review by appeal is exclusive. In view of this conflict of authority it is difficult to declare a rule which will be a safe guide in every case. As has been stated, this contrariety of decision has resulted in such confusion and uncertainty in the practice that lawyers have thought it necessary in many cases to take an appeal and file a petition for revision in the same case in order to be sure to obtain a review of the ruling challenged. The consensus of opinion seems clearly in favor of the principle that if the suit or proceeding is a controversy arising in bankruptcy proceedings it is appealable under Sec. 25a and not reviewable under Par. 24b; the latter refers only to matters in the bankruptcy proceedings itself, that is, any judicial determination, which may be made by a bankruptcy court from the time of the filing of the petition until the estate is closed, pertaining exclusively to the bankruptcy. This distinction is clearly established. As between the power to revise under Sec. 24b and the exercise of appellate jurisdiction under Par. 25a, both of which relate to the review of bankruptcy proceedings, the better rule is that in either of the three cases mentioned in Sec. 25a the review can only be by appeal; but in respect to any other matters in bankruptcy proceedings the review must be by a petition to revise. The Supreme Court has sustained this view by declaring that persons who

are entitled to an appeal under Par. 25a are not entitled to a petition to review under Par. 24b.

The Supreme Court of the United States in the case of *Matter of Loving*, 224 U. S. 183, 27 Am. B. R. 852, found on page 855, in an opinion by Mr. Justice Day, says:

The question now propounded is: Was the trustee also entitled to a review in the Circuit Court of Appeals, under Section 24b, by petition for review? Under that section authority, either interlocutory or final, is given to the Circuit Court of Appeals to superintend and revise in matters of law and proceedings of the inferior courts of bankruptcy within their jurisdiction. We think this subdivision was not intended to give an additional remedy to those whose rights could be protected by an appeal under section 25 of the act. That section provides a short method by which rejected claims can be promptly reviewed by appeal in the Circuit Court of Appeals, and, in certain cases, in this court. The proceeding under section 24b, permitting a review of questions of law arising in bankruptcy proceedings, was not intended as a substitute for the right of appeal under section 25. *Coder v. Arts*, supra, p. 233. Under section 24b a question of law only is taken to the Circuit Court of Appeals; under the appeal section, controversies of fact as well are taken to that court, with findings of fact to be made therein if the case is appealable to this court. We do not think it was intended to give to persons who could avail themselves of the remedy by appeal under section 25 a review by petition under section 24b. The object of section 24b is rather to give a review as to matters of law, where facts are not in controversy, of orders of courts of bankruptcy in the ordinary administration of the bankrupt's estate. In our judgment the rule was well stated in *Re Mueller* (C. C. A., 6th Cir.), 14 Am. B. R. 256, 135 Fed. 711, 68 C. C. A. 349, by Mr. Justice Lurton, then circuit judge:

"The 'proceedings' reviewable (under Par. 24b) are those administrative orders and decrees in the

ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate, which are not made specially appealable under Par. 25a. This would include questions between the bankrupt and his creditors of an administrative character, and exclude such matter as are appealable under Par. 24a."

The case of *Morehouse vs. Pacific Hardware Company*, *Supra.* also holds that provisions for appeal and revision are mutually exclusive, and cites a number of cases in support of this and on page 180 of the *American Bankruptcy Reports* says:

But, conceding the order to show cause to be a judgment of the court affecting a substantial right, we are of the opinion that a proceeding to punish for contempt one who has committed an act in violation of an injunction of a court of bankruptcy in a collateral matter, as in this case, is not a "proceeding in bankruptcy" which is subject to review in this court on original petition. Section 24 of the Bankruptcy Act of 1898, (Act. July 1, 1898, c. 541, 30 Stat, 553—U. S. Comp St. 1901, p. 3431—) establishes the appellate jurisdiction of circuit courts of appeals over "controversies arising in bankruptcy proceedings" and their jurisdiction in equity, "either interlocutory or final, to revise in matter of law proceedings of the inferior courts of bankruptcy." Section 25a provides for appeals from judgments in three certain enumerated steps in bankruptcy proceedings, "in respect of which special provision therefor was required." *Holden v. Stratton*, 191 U. S. 115, 10 Am. B. R. 786. 24 Sup. Ct. 45, 48 L. Ed. 116. There is in the language of the Act nothing to indicate that the revisory power so given to the circuit courts of appeals is more extensive than that which was exercised by the circuit courts under Bankruptcy Act March 2, 1867, c. 176, 14 Stat. 517. In *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414, it was held that the appellate jurisdiction conferred on the circuit courts by the Act of 1867 was of two classes of cases, one to be exercised

under a petition for review, the other by the ordinary appeal or writ of error. The same distinction has been recognized in construing the Bankruptcy Act of 1898, and it has been held that the provisions for appeal and for review on petition are mutually exclusive, and that the revisory jurisdiction does not include any orders or decrees which are appealable or reviewable on writ of error.

Whatever the situation may be, had an appeal been taken under subdivision A of Section 25, of the Bankruptcy Act, and a petition for review been filed under subdivision B of Section 24 of the Bankruptcy Act, it is not presented here, for no appeal has been taken. It is now too late to take the appeal, for it must be taken within 10 days, and certainly petitioner cannot claim the benefit of having mistaken his remedy and ask that a petition to review may be treated as an appeal. He is only in that position if he has pursued both remedies.

Even if both remedies had been resorted to, it would be the duty of this Court to determine which of the two methods the Court is authorized to entertain, as each of these methods of procedure is exclusive of the other. This question has been set at rest by numerous decisions of this Court.

Bothwell v. Fitzgerald, et al., 34 Am. B. R. 261.

Matter of Creech Bros. Lbr. Co. 39 Am. B. R. 487.

The general consensus of opinion is that Section 25a, having provided a means of review by appeal three kinds of judgments, every other means is excluded.

First Nat. Bank of Miles City v. State National Bank, (9th Circuit) 12 Am. B. R. 440; 131 Fed. 430.

"Where an appeal properly taken under Section 25a involves only a question of law, it may be treated as a petition for revision."

In re William (9th Circuit) 156 Fed. 934. 19 Am. B. R. 362. 389

That is the law of this Circuit, and an inspection of the petition in this case and the specifications of error (Tr. 5) clearly shows that there is something more than a question of law involved, and that questions of fact must be reviewed.

In the case at bar there is a controversy as to the facts, and therefore the matter is not one of law, but a mixed one of law and fact and can only be reviewed by appeal under Section 25a of the Bankruptcy Act.

"Where the question as to the validity of a chattel mortgage in which the mortgagor claims priority is one of law only, depending on a statement of facts not contested, it is properly reviewable by a petition to revise under Section 24b of the Bankruptcy Act." In re Flatland (9th Circuit) 28 Am. B. R. 476.

THE MATTER IN CONTROVERSY HERE IS A
CLAIM WHICH THE BANKRUPTCY COURT
DECLINED TO ALLOW AS A PREFERRED
OR PRIORITY CLAIM.

This being the case, the controversy comes therefore under clause 3, par. 25a of the Bankruptcy Act, which provides for an appeal "as in equity" from a "judgment allowing or rejecting a debt or claim of \$500 or over" and is appealable under that section, and also under Section 24a as a controversy arising in bankruptcy proceedings.

This method of appeal is exclusive.

Matter of Creech Bros. Lbr. Co. (9th Circuit) 39 Am. R. 487.

In matter of Lane Lumber Company (9th Circuit) Vol. 33, Am. B. R. 497, it is held "a judgment denying the right to file a claim as secured and make substitute proof thereof after it has been allowed as unsecured in an amount exceeding \$500 is only reviewable by appeal un-

der Section 25a of the Bankruptcy Act." "The proper test in determining the appropriate remedy for the review of the action of a bankruptcy court is what was the 'character of the proceeding' by which the jurisdiction of the Bankruptcy Court was invoked."

In re Mueller, Trustee, (6th Circuit), Vol. 14, Am. B. R. 256.

In Knapp v. Milwaukee Trust Co. 20 Am. B. R. 671, 162 Fed. 675, it is held: "Where, in answer to a trustee's petition for leave to sell the bankrupt's stock in trade, one claimed a lien upon part of the assets under the chattel mortgages which were found to be void, the order for leave to sell is reviewable only by appeal."

Loeser v. Savings Deposit Bank & Trust Co. 20 Am. B. R. 845.

THERE ARE QUESTIONS OF FACT TO BE REVIEWED AND THIS CANNOT BE DONE BY PETITION TO REVISE.

Section 24 of the Bankruptcy Act of July 1, 1898, gives the Circuit Court of Appeals authority to superintend and revise in matters of law the proceedings of the several inferior Courts of Bankruptcy within their jurisdiction. It was intended thereby to provide a summary method for revising the orders and decisions of Courts of Bankruptcy upon questions of law.

In re Grassler v. Reichwald (9th Circuit) Vol. 18, Am. B. R. 694.

Olmsted-Stevenson Co. v. Miller, (9th Circuit) 36 Am. B. R. 816.

In the case of In re Frank (8th Circuit), Vol. 25, Am. B. R. 486, it is held: "Decisions which require the consideration of conflicting evidence or evidence, though not conflicting, from which different deductions or con-

clusions may reasonably be drawn, may not be reviewed upon petition to revise under Section 24b of the Bankruptcy Act, but upon appeal only."

This is a petition for review by the Circuit Court of Appeals of the Ninth Circuit of an Order of the District Judge of the United States Court, District of Montana, affirming an order of the Referee in Bankruptcy.

STATEMENT OF CASE.

Petitioner, the Scandinavian American Bank, in its brief, has not made a full statement of the case and we believe that it will be well so to do in order that the Court may have a clear view of the situation.

On February 21, 1916, a petition was filed in the above District Court asking that the above named Bankrupt, be adjudged an involuntary bankrupt, and thereafter on the 15th day of March, 1916, an adjudication was made. Thereafter the matter was referred to Honorable E. M. Niles, Referee in Bankruptcy.

In the usual course, the Scandinavian American Bank of Big Timber, Montana, filed its claim with the referee, asking that its claim be allowed as secured claim. To this claim objections were filed by the Trustee and certain creditors asking that said claim be disallowed in part as a secured claim.

On June 29, 1915, W. N. Russell, being indebted to the Scandinavian American Bank of Big Timber, made, executed and delivered to the bank, a mortgage on certain real estate and a chattel mortgage on certain personal property, consisting of a stock of merchandise at Big Timber, to secure the payment of an indebtedness then existing to the bank and the sum of \$300.00 advanced by the bank at the time of execution of the mortgages and a further advance of \$250.00, as provided by the chattel

mortgage. The mortgages are made a part of the proof of claim.

The two mortgages were given to secure the payment of a note, dated January 29, 1915, in the amount of \$4,165. (Tr. 65.)

The amount of the claim of the bank, and it asks that in its entirety it be allowed as a secured claim, is made up of the original note of \$4,165.00, and three notes, one for \$125.00, Exhibit D. (Tr. 66); one for \$170.90, Exhibit E. (Tr. 67), and one for \$170.00, Exhibit F., (Tr. 67), and further advances.

This indebtedness was secured by a mortgage on certain real estate in Big Timber, Sweet Grass County, Montana, and a chattel mortgage on certain merchandise in the possession of Bankrupt. At the time the mortgage was given the merchandise was left in his possession for the purpose of carrying on business, in the usual course, under the provisions of the chattel mortgage.

Bankrupt was engaged in the lumber, coal and cement business at Big Timber, prior to the giving of the note and mortgages in question, and up to the time he was adjudged a bankrupt.

The validity of the mortgage on the real estate is not in controversy, for at the time of the filing of the petition herein and the adjudication, the four months preferential period, had passed.

The value of the real property mortgaged was by stipulation agreed upon in the sum of \$1,830.00. The bank therefore is entitled to its security to that amount, less cost of administration.

The chattel mortgage only is in a controversy and it is the contention of respondent that the balance of the claim of the Petitioner, The Scandinavian American

Bank, should not be allowed as a secured claim, and a lien on the proceeds of the sale of the merchandise for the reasons set out in the objections of respondent.

It is further contended that even assuming the chattel mortgage is valid, that there were sales of merchandise made on credit to the amount of \$1694.95 (Stipulation Tr. 98) which were made for the account of the Scandinavian American Bank and which would reduce the claim of the bank that amount, in addition to the amount realized from the sale of the real property even if the mortgage was valid.

The matter was heard before the referee and he filed his decision herein holding that the chattel mortgage was actually and constructively fraudulent as to the creditors of W. N. Russell and therefore to the trustee. The referee allowed the claim of the bank as a secured claim to the amount of \$1830.00, the value of the real property. and held the chattel mortgage to be fraudulent and void, and disallowed the claim of the Scandinavian American Bank as a secured claim to the amount of \$2790.90, and ordered that the bank be paid pro rata with the other creditors, to the amount of \$2790.90. (Tr. 40.)

From this Order a Petition for Revision was presented to the Hon. Geo. M. Bourquin, Judge of the United States District Court for the District of Montana, (Tr. 41). Thereafter Judge Bourquin affirmed the Order of the Referee. (Tr. 55).

ARGUMENT.

The Scandinavian American Bank and W. N. Russell were doing business at Big Timber prior to the execution of the chattel mortgage. Russell for a period of nearly two years, and the bank commenced business about two weeks before the giving of the chattel mortgage. They

continued to do business at Big Timber up to the time of the adjudication.

Big Timber is a town of about two thousand inhabitants and the place of business of the bank and of W. N. Russell Lumber Company, are about three blocks and a half apart. (Tr. 279).

The Scandinavian American Bank filed its claim in the above matter as a secured claim. The amount of **the** claim is four thousand six hundred twenty dollars ninety cents, (\$4620.90) with interest. Of this amount only four thousand one hundred sixty-five dollars, (\$4165.00), the amount of the note given is secured by the real estate and the chattel mortgage. The balance of the claim is unsecured. Our position is that under the terms of the chattel mortgage notwithstanding the fact that the mortgage authorized two hundred fifty dollars (\$250.00) additional credit, from the very terms of the mortgage itself; that is, that he was to buy for cash and do a cash business, he was prohibited from borrowing additional money to carry on the business.

This sum of four thousand one hundred sixty-five dollars (\$4165.00) is secured by a real estate and a chattel mortgage. The chattel mortgage is the only one that we are concerned with in this inquiry. There is no controversy but that insofar as the bank obtains security by virtue of the real estate mortgage, it is entitled to the proceeds of the sale of the real estate mentioned in the proof of claim and the agreed value of this real estate is one thousand eight hundred thirty dollars (\$1830.00), of which fifteen hundred dollars (\$1500.00) has been paid to the bank and three hundred thirty dollars (\$330.00) is in the hands of the trustee for the purpose of being used to pay the pro rata costs of administration. So the amount of the claim, insofar as we have to consider it is four

thousand one hundred sixty-five dollars (\$4165.00) less one thousand eight hundred thirty dollars (\$1830.00), leaving two thousand three hundred thirty-five (\$2335.00), effected by the chattel mortgage. The value of the real estate being fixed by the order confirming the sale of the real estate.

It is claimed in the objections filed to the proof of claim of the Scandinavian American Bank that the chattel mortgage is fraudulent and void as to creditors of W. N. Russell and consequently fraudulent and void as to the trustee standing in the shoes of the creditors. (Tr. 19-20-21-22-23-24-25.)

We will not set out at length the reason for contending that it is fraudulent and void as to creditors, but will leave the court to ascertain those reasons from the objections filed by the trustee and creditors. (Tr. 18 to 27 inclusive.)

The objections are based on Section 70, subdivision A. par. 4, and subdivision E. of the Bankruptcy Act, which read as follows:

“A. The trustee of the estate of a bankrupt upon his appointment and qualification, and his successor or successors if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except insofar as it is to property which is exempt, to all 1....; 2....; 3....; 4.... property transferred by him in fraud of his creditors;....”

“E. The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided and may recover the property so transferred, or its value from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it,

except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Section 6127 Revised Codes of Montana, 1907, is authority for the transfer being voided by creditors had bankruptcy not intervened.

The statute is as follows: "Every transfer of property, or charge thereon made, every obligation incurred, every judicial proceeding taken, and every act performed, with intent to delay or defraud any creditor, or other person, of his demands, is void against all creditors of the debtor and their representatives or successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

Section 70, paragraph A, clause 4, has been construed repeatedly by the Courts, Federal and State and it has been held that the trustee may sue to avoid any conveyance which a creditor could have avoided, although more than four months prior to the adjudication of bankruptcy.

In *Bush v. Export Storage Co.*, Vol. 14, Am. B. R. page 139, a case decided by the U. S. Circuit Court for the Eastern District of Tennessee, it is said:—

"This is a bill by a trustee in bankruptcy to have certain warehouse receipts declared invalid and set aside, so far as they are made a basis of a claim to material found on the premises of the bankrupt at the time of the bankruptcy proceedings were instituted.

"It may be important in this case, in the very outset, to determine the right which the trustees are undertaking to assert and enforce in this case, and the sources from which the trustees derive the right and remedy."

Sec. 70A of the Bankruptcy Law provides: "The trustee of the estate of a bankrupt, upon his appointment and qualification,shall....be vested by

operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, . . . to all . . . (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon or sold under judicial process against him."

The trustee upon his appointment and qualification, is thus vested, by operation of law, without any deed of conveyance, with the title of the bankrupt, "as of the date he was adjudged a bankrupt." . . . In relation to a right or title thus derived by operation of law from the bankrupt himself, it is very true and well settled, that the trustee takes just such title as the bankrupt had, and no better or greater title, and subject to estoppel as to liens or equities to which the title was subject in the hands of the bankrupt.

But this proposition, although well settled, does not meet or dispose of the contention here presented, for the right which is asserted by the trustee in the present suit was not derived by operation of law from the bankrupt, and the remedy being pursued is not one which was available to the bankrupt. **The right here asserted, and the remedy adopted to enforce that right, passed by operation of law, not from the bankrupt itself, but from creditors of the bankrupt, and in their right, and not by any remedy which passed by operation of law, from the bankrupt. And so this suit does not involve those provisions of the bankruptcy statute which vest in the trustee the right to avoid certain defined transfers declared invalid by the Bankruptcy Act itself, and to recover the property fraudulently conveyed.** Transfers which are deemed fraudulent in Bankruptcy and so declared by the Bankruptcy Act itself, are, first, conveyances and transfers, by which a creditor obtains a preference of his claim over other creditors; second conveyances which are intended to hinder, delay and defraud creditors; and third, (Sec. 67 E. Clause (3)) transfers, void as to creditors under the local laws of the several states; but these transfers are prohibited, and authority vested in the trustee

to set them aside, only when made within four months

But besides this class of transfers made void by the Bankrupt Act itself, as being against its policy of equal and fair distribution, the bankruptcy law (Sec. 70 A. subsec. 4), provides that the trustee shall be vested by operation of law with any property transferred in fraud of his creditors, the precise language of the Act, being, "transferred by him in fraud of his creditors."

There is no four months limitation on this class of transfers, and the provision includes fraudulent conveyances which are so by the common law, by statute law, and by any other recognized law of the State. Loveland on Bankruptcy (2nd. Ed.) sec. 158 and cases cited. Of course, the fraudulent bankrupt is without right to set aside a conveyance made by him in fraud of his creditors. It is valid between the parties, but by operation of the very terms of the act, the right which before bankruptcy belonged to the creditors passes from them, and is vested in the trustee.

Fraud, actual or constructive, is a necessary element to give the trustee in bankruptcy a right of action; and the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the adjudication.

The language of section 70 E is as follows: "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value."

It is quite obvious enough that the bankruptcy statute has vested in the trustee this comprehensive

power to set aside, in favor of the creditors, **conveyances which the creditors of the bankrupt might have avoided**, subject to the qualifications of limitation found in Sec. 70 E, which provides, in terms, that the trustee, "may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value...."

In the case of *In Re Wm. H. Gray*, 3 Am. B. Rep. 647, the Supreme Court of New York also construes this Bankruptcy Act, and it says in part as follows:

"It has also been held that such voluntary assignment though general and non preferential, if made within four months prior to the filing of the petition, is a constructive fraud upon the Bankruptcy Act, in that it interferes with the control of the assignor's estate by the court in bankruptcy and prevents the due operation of the bankruptcy system It is provided in Sec. 67 E. of the Act that all conveyances, transfers and assignments of this property within four months by a person so adjudged a bankrupt, with the intent to hinder, delay and defraud his creditors, shall be null and void as against such creditors, except as to purchasers in good faith and for a present fair consideration; and that the property so conveyed, transferred or assigned shall be and remain a part of the assets of the estate of the bankrupt and shall pass to his trustee, whose duty it shall be to recover, the same by legal process or otherwise for the benefit of the creditors. This section embraces all acts however innocent, in themselves, which are frauds upon the bankruptcy Act; and consequently Gray's general assignment, though as a matter of fact untainted with fraudulent purpose, was yet, as matter of law, made with intent to hinder, delay and defraud the assignor's creditors within the meaning and purpose of the act."

Sec. 67 E. undoubtedly covers as well transfers which are fraudulent as a matter of fact, if made

within four months. It is apparent however, that this section does not embrace fraudulent transfers which, like those under consideration, antedate four months.

To reach such fraudulent transfers section 70 E. seems to be specially adapted. That provides that "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication."

It will be observed that there is here no four months limitation, and it is plain that the limitation which runs through the act in connection with frauds on the system was at this point advisedly omitted. The purpose of the two sections is quite apparent. One covers frauds upon the act, whether actual or constructive, committed within the four months; the actual or common law frauds exclusively, committed at any time. When the trustee seeks to annul the former, he does so in the right which the due operation of the act confers upon him. That right is given by Sec. 67 E, fortified by the title conferred upon him in terms by Sec. 70 A. subd. 4, and he may exercise that right, though the nature of the transfer be such that but for the act, no one or all of the creditors could avoid it.

When, however, the trustee seeks to avoid a fraudulent or any avoidable transfer by the bankrupt antedating the four months, he does so, not in the right conferred as a concomitant to the due operation of the system, but exclusively in the creditors' common law right. He is, with relation to these anterior transfers, so to speak, subrogated to that right. Such of these anterior transfers as any creditor might have avoided, he may avoid. Such as no creditor could have avoided, he cannot avoid.

... Nor was it intended to leave avoidable transfers antedating the four months to the operation of ordinary creditors' bills. No individual creditor is permitted, by the bankruptcy Act, to proceed upon

his judgment against the bankrupt. Should he attempt to file a creditor's bill thereon, he would at once be stayed by the Bankruptcy Court. **Sec. 70 E.** therefore, means what we have indicated or else the Bankruptcy Act operates as a legislative device to permit fraudulent transfers to take effect with impunity in case they are successfully concealed for the specified four months. And this, certainly, cannot be inferred."

In *Beasley v. Coggins*, 12 Am. Bankruptcy Rep., 358, the Supreme Court of Florida, has the following to say:

"Sec. 67 E, treats of conveyances, transfers, etc., made by a bankrupt within four months prior to the filing of the petition, with intent to hinder, delay or defraud creditors."

Some of the Federal Courts have found difficulty in reconciling these sections of the Bankruptcy Act, but it seems to us that the views expressed in *In re Mullon*, 4 Am. B. R. 224, 101, Fed. 416, are substantially correct. It is there said that section 70 E was intended to provide simply that the trustee in Bankruptcy should have the same right to avoid conveyances as was possessed by creditors, or any of them, and this with special reference to the statute of 13 Elizabeth. **Under the Bankruptcy Act, when one is adjudged a bankrupt, creditors are not permitted to attack fraudulent conveyances of their debtor, made more than four months of the adjudication of bankruptcy; and if the trustee could not do so then the act would constitute "a device to permit fraudulent conveyances to take effect with impunity in case they are successfully concealed for the specified four months."**

In *In Re Scrinopskie*, 10 Am. Bankruptcy Rep. 221, page 224, the U. S. District Court, for the District of Kansas says:

"So far as the merits of the controversy are concerned, it plainly appears from the evidence that the property claimed by the intervenor was originally the property of the bankrupt, and, in my judgment,

the pretended sale by the bankrupt to his brother was a subterfuge without consideration, and with the express purpose of hindering and defrauding his creditors.

The fact that such transfer was made more than four months prior to the adjudication can make no difference."

The United States Circuit Court of Appeals for the Seventh Circuit, in an opinion by Circuit Judge Jenkins found in *In re Rodgers* Vol. 11, Am. B. Reports on page 93 has this to say:

"We are therefore brought to the question whether, under the Bankruptcy law, the trustee takes solely in the right of the bankrupt, or whether he also represents the rights which creditors have, and the authority to enforce them; whether the petition in bankruptcy is merely the appropriation by the bankrupt of his property to his creditors, **or an assertion in behalf of the creditors of rights which they had independently of the bankrupt, which he himself could not assert.** Notwithstanding some loose expressions in the decisions on this subject, we are satisfied, from a careful scrutiny of the act, that the filing of the petition is something more than the dedication by the bankrupt of his property to the payment of his debts; that the trustee is not only invested with the title of the property, but since, after the filing of the petition, the creditors are powerless to pursue and enforce their rights, the trustee is vested with their rights of action with respect to all property of the bankrupt transferred or incumbered by him in fraud of his creditors, and may assail, in behalf of the creditors, all such transfers and incumbrances to the same extent that creditors could have done had no petition been filed."

Collier on Bankruptcy, 10th Edition, pages 1002 and 1003, says:

"c. Property Fraudulently Transferred—(1) In General.—By subdivision 4 property transferred by the bankrupt in fraud of his creditors passes to his trustee. This is the converse of the doctrine that

trustees take title subject to equities; they also take title to property which the bankrupt has fraudently transferred, and, in which, therefore, the creditors have equities. The Trustee's interest in such property is stronger than was that of the creditors in whose stead he stands, for he has a title. The trustee is vested not only with the title of the property but also with the creditors' rights of action with respect to property of the bankrupt fraudulently transferred or incumbered by him, and he may assail in their behalf all of such transfers and incumbrances to the same extent as though the debtor had not been declared a bankrupt. Where after the filing of an involuntary petition and before adjudication a creditor attaches the bankrupt's assets, the trustee may recover the proceeds of the attachment, even though they were less than the percentage to which the creditor would have been entitled in the bankruptcy proceedings. It is apparent that this provision applied to all property transferred by the bankrupt at any time in fraud of his creditors. If actual fraud be shown, as where a bankrupt while insolvent transfers real estate to his brother for an inadequate consideration, and the transfer was not recorded, the transfer may be set aside. The trustee's remedy when title is claimed adversely is, as has been seen, usually a suit in the proper court. This subdivision should be read in connection with Par. 23, par. 67-e and par. 70-e."

In *Holbrook v. International Trust Company*, Vol. 33, Am. B. R., page 808, it is held:

"Section 70-e of the Bankruptcy Act merely gives the trustee in Bankruptcy authority to avoid any transfers of property made by the bankrupt 'which any creditor' might have avoided, and the question whether a particular transfer was or was not fraudulent as to creditors under the Act depends upon the laws of the State which govern the transfer of the property in question."

Moore on Fraudulent Conveyances, Vol. 2, pages 1182-1184.

In the case *In re Garcewich* 8 Am. B. R., page 152, we find the following:

“Under the present Bankrupt Act, as under previous bankrupt acts, the trustee takes the property of the bankrupt, **in cases unaffected by fraud**, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act. (Cases cited). **It is not the meaning of the present act that the institution of proceedings in bankruptcy should secure immunity to the title of fraudulent vendors or mortgagors, and deprive creditors of a resort to property, out of which, but for the proceedings, they could have satisfied their claims.** Sec. 70 declares in express terms that the title of the bankrupt shall vest in the trustee to ‘all property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him’. That language is sufficiently comprehensive to vest the trustee with title to all property of the bankrupt as against the fraudulent title of another.”

THE FRAUD ALLEGED IN THE OBJECTIONS INVALIDATES THE MORTGAGE UNDER THE LAWS OF THIS STATE.

Our contention is that the chattel mortgage was actually and constructively fraudulent and we contend this is shown by preponderance of the evidence and that the referee was justified in setting the chattel mortgage aside as fraudulent, and that the order of the District Judge was also correct.

We will take up the different allegations of fraud alleged in the objections, in the order in which they are

alleged, and endeavor to point out the evidence sustaining these objections.

There is no contention but that mortgages of the kind under consideration are valid, providing they are entered into in good faith, with honest intentions, providing further, that the parties thereto carry it out in good faith.

The case of Noyes vs. Ross, 23 Mont. 425; 59 Pac. 367, goes into the question very thoroughly and is the leading case in the State of Montana and we desire briefly to refer to it. The court says on page 436 of the Montana report:

"If the debt was one honestly due, the mortgagors had a right to secure it, whether due to a relation or anyone else, even though their action left nothing for their other creditors, provided, always, the transaction was in good faith, and entered into with honest intention."

The first proposition of law, stated by counsel for petitioner to the effect that chattel mortgages of this kind are valid, is hardly a correct statement, for it leaves out the question of the subsequent good faith of the parties to the transaction. With this modification, we have no fault to find with the first statement of law made by counsel.

THE CHATTEL MORTGAGE WAS NOT MADE IN GOOD FAITH BETWEEN THE PARTIES TO THE INSTRUMENT.

The counsel's first proposition of law is that the mortgage is valid if when made in good faith, we insist that it should be modified to the extent that it must also be carried out in good faith.

In the present case however, we insist that it was not made in good faith, in so far as the rights of creditors and the trustee are concerned, and that the evidence supports this finding of fact of the Referee and the District Judge

and justifies the tenth allegation of the objections. (Tr. 18 to 24.)

On page 64 of the transcript, Mr. Moe, the cashier of the Bank, in response to a question of his counsel relates the circumstances incident to the making of the loan and he states as follows:

"Mr Russell had borrowed money from us from time to time, and we had quite a number of notes in the pouch and practically all of them were past due, and knowing Mr. Russell's condition that he was owing quite a bit besides what he owed us, we got Mr. Russell in there one day and took a note for the full account of his indebtedness to us at that time, which was also secured in chattel and real estate mortgage, and told him that we would be willing to carry him for this money; that we would like to see him make out and we would be willing to carry him as long as he kept his stock up in shape and his business was done, and that it was perfectly agreeable to us that he pay off the other creditors, as long as he did not run his stock down and took care of his business."

Again on pages 76 and 77 of the transcript on Cross Examination, Mr. Moe states:

"Q. Now, Mr. Moe, you stated that the understanding was, when this chattel mortgage was given and this loan made, that Mr. Russell was to keep his stock in shape and keep it up and do business right?

A. We told him that was about as strong as we could possibly go with him, and he would have to try to conduct his business a little better and we would be glad to stay with him as long as he was attending to his business and taking care of his outstanding creditors and that we were willing to carry him.

Q. You mean the creditors that were in existence at the time this mortgage was given?

A. The creditors he had outside of the bank.

Q. Did you make any inquiry from him as to

how much was owing at that time to his creditors, outside of the bank?

A. I do not remember whether he made us a statement at that time or not.

Q. Do you know whether you made any inquiry of him?

A. I think we did, we talked it over.

Q. And the understanding also was at that time that after the giving of the chattel mortgage, he was to keep his stock up and not permit it to run down?

A. Naturally when a bank owns chattel property, they want a man to take care of it.

Q. You stated that he was to pay off his other creditors, which he testified to, that was to be done out of the proceeds of his sales of merchandise from time to time subsequent to the giving of that mortgage?

A. We told him to take care of his bills.

Q. But he was to take care of his bills to his creditors, was he not, out of his daily business?

A. Yes."

The Bankrupt W. N. Russell on page 89 of transcript with reference to the execution of the chattel mortgage says:

"Q. What was said at the time of the execution of this mortgage, either by Mr. Campbell or Mr. Moe, with reference to this chattel mortgage and what you were to do in connection with it?

A. They were both there when I asked if I should keep a record and daily account of what I was doing, and they said that would not be necessary, and I then asked them if I should come in the first of the month with statement of what I was doing, and they said, no, that they would call for a statement when they wanted one."

W. N. Russell, page 92 of the transcript, with reference to the keeping of his bank account says:

"Q. You kept your bank account where?

A. With the Scandinavian American Bank.

Q. Subsequent to the 29th day of June, 1915?

A. Yes.

Q. In whose name did you keep it?

A. W. N. Russell.

Q. Did you keep an account in the Scandinavian American Bank in any other person's name?

A. No.

Q. When you made your deposits in the bank, did you at any time subsequent to the 29th day of June, 1915, deposit money in the Scandinavian American Bank, or any other bank to the credit of the Scandinavian American Bank?

A. No.

Q. The proceeds and the receipts of your business from sales and moneys collected after deducting the necessary expenses of carrying on your business and for the payment of current bills? Where were they deposited, Mr. Russell?

A. In the Scandinavian American Bank.

Q. To whose credit?

A. W. N. Russell.

Q. All of this money that was deposited in the Scandinavian American Bank to the credit of W. N. Russell, who was it checked out by?

A. W. N. Russell.

Q. On checks signed by whom?

A. W. N. Russell.

Q. By anybody else?

A. No.

Q. After these amounts that were deposited in the Scandinavian American Bank to your credit subsequent to the giving of this chattel mortgage on the 29th day of June, 1915, were any of the moneys deposited applied on the payment of this \$4165.00 note?

A. No.

Q. Or to any other note that you gave to the bank that was covered by this mortgage?

A. No."

Mr. Moe was the cashier of the bank during the entire period. (Tr. 69). With reference to this matter he says: (Tr. 249).

“Q. Now, that account was kept with W. N. Russell subsequent to June 29, 1915, and up to the date I’ve mentioned in the same manner that it was kept prior to the giving of this chattel mortgage and during the time that he was doing business with the bank?

A. The same system of book keeping?

Q. Yes.

A. Yes, sir.

Q. And there was no change in his account, it was kept in the same heading and the account followed on after June 29th, 1915, just the same as it had been kept as to method and system, as before?

A. It was kept in the same manner, yes, sir.

Q. And under the same heading?

A. W. N. Russell.”

We contend that this shows very clearly that from the very inception of the transaction, the bank did not require the provisions of the chattel mortgage to be lived up to and that Russell did not intend to live up to them.

The evidence which we will refer to hereafter shows that money, from the sales of merchandise was applied on indebtedness existing at the time of the giving of the chattel mortgage in question and contracted prior thereto.

On page 30 of their brief, counsel for the bank seek to justify this and they say:

“Exhibits from one to thirty-six are evidence of debts paid by the bankrupt, which were authorized under the terms of the mortgage. Had these bills not been paid, creditors would have then brought suits. The bank by the terms of the mortgage waived its lien to the receipts to this extent. To continue in business Russell must buy and sell, and in order to buy he must pay previous bills. Some of the bills he paid were incurred prior to the execution of the mort-

gage. Russell's debts before the mortgage continued to be Russell's debts after the mortgage. They were still the liabilities of the business. The mortgagee did not try to and could not have suspended payment of the debts incurred prior to June 29, 1915. Failure to pay for a car load of lumber sold to him on June 25th before the mortgage would have the same result as failure to pay for a car on July 5th after the mortgage. In either case he could not continue to buy unless he paid and if he could not buy he could not sell. But if this problem is viewed from another angle, it is difficult to see how these payments could prejudice the other creditors, who, but for them would have received nothing, and who are through the trustee objecting to the allowance of the bank's lien as a preferred claim, and are the people who received payments upon bills."

We therefore contend, that it was the intention of the bank and Russell that he was to continue and carry on his business in the same way that he did prior to the giving of the chattel mortgage, and that the sole idea of the bank and Russell was to work the business out if possible.

This idea may have been a laudable one but it was a fraud upon the creditors then existing and upon the subsequent creditors who never received anything at all, who had a right to rely upon the provisions of the chattel mortgage being honestly and fairly carried out, for they had no security and the bank did.

Our Supreme Court in the case of *Noyes vs. Ross*, *Supra.* says:

"A mortgage which authorizes the mortgagor to retain possession with the right to sell a stock of goods mortgaged, in the ordinary and usual course of trade, if otherwise good, is on its face a valid instrument, provided that it appears therein that such sales were to be for the benefit of the mortgagee, and he is to account to the mortgagee for the proceeds of the

sales. To this EXTENT the courts and text writers have advanced in later years. We must remember that, as a substitute for possession in the mortgagee, the mortgage must be filed in the office of the County Clerk. Secrecy is thus obviated, and opportunity to perpetuate fraud is greatly lessened. The records are public, and creditors are thereby constructively advised of the nature and provisions of the contract granting the lien. It is the policy of the recording acts that has outweighed the policy of the older rule, under which, under the theory of constructive fraud mortgages with power to sell the mortgaged goods in the usual course of trade, with right to sell, cannot be said by judges to be the result of fraudulent intentions on the part of the parties to them, **unless such intention existed in fact.**

In *Noyes vs. Ross*, *Supra*, page 44, our Court says:

"But will be upheld or condemned according as the arrangement is entered into and carried out in good faith or not."

The provisions of the chattel mortgage permitting sales of merchandise for not to exceed thirty days' credit or for cash, was violated by Russell, with the knowledge and consent of the Bank.

We take the position that these sales were made for the account of the Bank, the mortgagee, and if this were the only provision of the chattel mortgage violated, no one could complain, but the other provisions violated show that it was the intention to totally disregard this also and it is one link in the chain, therefore question is of some importance.

In discussing this question counsel for the Bank say: That Russell denied giving credit for any period to exceed thirty days (Brief page 12), and they say on page 14 of the brief that the Bank was not a fraudulent party thereto. On page 93 of the transcript Russell admits that he sold merchandise on credit.

It was stipulated that between the 29th day of August, 1915, the date of the giving of the chattel mortgage and up to the time of the filing of the petition herein, that merchandise to the amount of \$1694.95, was sold on credit and was unpaid at the time of the filing of the petition. (Tr. page 99.)

It is argued by counsel that because Russell did not sell on credit to exceed thirty days that there is no violation of this provision of the chattel mortgage and the Bank did not know of it and was not a fraudulent party thereto. The Bank did, however, know of it. On page 228 to 230 of the transcript, Russell in his testimony says:

“Q. Did Mr. Moe ever ask you what you were doing with the money taken in every day and the profits of your business?

A. Yes, sir.

Q. Where did you tell him they were going to?

A. I told him it was taking all that was coming in to keep up my stock and keep going, which it was doing. I was holding out too much credit which I found out afterwards was impossible to do, and he told me so at the time.

Q. When did he tell you that?

A. Probably once or twice every month when he thought I should be advised to back off on giving so much credit a little bit.

O. Then you discussed with Mr. Moe the question of your giving too much credit—did you?

A. I did not discuss it with him. I asked him, told him the parties to whom I was giving credit in the lumber business. I didn't ask him if he should give so and so credit. In the lumber business if we're going to give a man credit we tell him “Yes” and go ahead and load him up and get away with it.

Q. He told you at least two or three times a month you were giving too much and too long credit?

A. No, that's not what he told me.

Q. What did he tell you?

A. I never told him the length of time I was giving credit. As a matter of fact I made it a point to never give a man over 30 days but as I found out 30 days meant anywhere from 30 days to never.

Q. So you discussed that phase of it with Mr. Moe, did you?

A. Well, I did not discuss it with him as to how long it was, these accounts coming in, etc., and so on; but I did tell him when he asked who I was giving credit to, those I had in my mind, I told him about.

Q. And you told him when you spoke of these accounts, what credit had been given and how old they were and all that kind of thing—you discussed with him—did you?

A. I can't say I ever told him how old any of them were.

Q. Did he ever inquire?

A. As to that I don't know.

Q. Did he ask you, Mr. Russell, why these accounts weren't collected and all that kind of thing?

A. No, I imagine that he knew as well as myself why they were not collected in."

It will therefore be seen that Moe, an officer of the Bank and the cashier, its principal officer, knew the way of giving credit and his knowledge is the knowledge of the Bank.

It will not do to say that merchandise could be sold on credit without any distinct giving of credit to exceed 30 days, that because the accounts were not paid between thirty days, it is not an intentional sale and a violation of mortgage. For the protection of creditors, it was the duty of Russell and the duty of the Bank to see that this provision of the mortgage was honestly carried out and if they could not carry it out, then it was their duty to cease doing business.

It is not an answer to this that the sales were solely

for the credit of the mortgage, and no one was being hurt for the reason, that the sales on credit might have been in excess of the amount due to the mortgagee.

While on this subject, we desire to urge that these sales to the amount of \$1694.95 were made on the account of the Bank and even if the Court should find that the chattel mortgage itself was not fraudulent, that amount would have to be deducted from the \$2790.90 due to the bank, after it applied on the amount of its claim, the value of the real property, the Bank would only be a secured creditor for the balance.

The case of *Noyes vs. Ross*, *supra*. is authority for this position and the Court on page 445 says:

“Nor were they (creditors) hurt by an extension of a credit for thirty days because, as against them or any unsecured creditor in like position all sales, whether cash or for credit were to be accounted for; and we are of the opinion credit sales should, as between mortgagors and mortgagee, all be deemed cash payments....although....the credit may not have been collected, and may in fact have been unpaid at the time of the accounting.”

The court cites numerous cases in support of this proposition.

The cases of *Howard vs. Wulfekuhler* (Kan.) 13 Pac. 366, and *Atchison Saddlery Co. vs. Gray* (Kan.) 64 Pac. 987, are cited by counsel for the Bank, are not in point. In these cases the contention was made that a violation of the provisions of the mortgage by the mortgagor without the knowledge of the mortgagee, rendered the mortgage invalid. These cases are not in point for we claim that the Bank in this case had actual knowledge.

THE PROVISION OF THE CHATTEL MORTGAGE AUTHORIZING THE MORTGAGOR TO SELL FROM HIS STOCK OF MERCHANDISE, KEEPING ACCURATE ACCOUNT OF SUCH SALES AND DURING BANKING HOURS OF EACH DAY DEPOSIT TO THE BANK, AFTER PAYING CURRENT BILLS AND EXPENSES OF CARRYING ON BUSINESS, WAS VIOLATED.

The next provision of the chattel mortgage which we claim was violated is the provision that Russell was to keep an accurate account of all sales and during Banking hours of each day deposit the proceeds of such sales in the Bank of the Mortgagee to the credit of the Bank to apply on the note secured by the mortgage retaining only in his office, sufficient to pay current bills and expenses of carrying on the business and for making change.

It does not need any argument or quotation from the testimony to show that this provision of the chattel mortgage was never complied with, and was never intended to be complied with.

At the time the mortgage was given, Russell had his account in his own name with the Scandinavian American Bank, the mortgagee. No change was made in the method of handling this, from the time the mortgage was given until the petition was filed. Russell kept his account and deposited all the proceeds of the business, in his own name with the Scandinavian American Bank, the mortgagee. Placed money in daily, check it out daily. There were never any of the proceeds of the business deposited daily or at all in the Bank of the Scandinavian American Bank to its credit as required by the terms of the chattel mortgage. Russell was permitted to check it out as he saw fit, pay it to whom he saw fit; to attorneys who had

accounts against him, even to the extent of paying money to his brother, and cousin, and to the Scandianvian American Bank itself, just as he pleased. In other words he was permitted to conduct the business as if the chattel mortgage did not exist; and during the period his deposits amounted to Eight Thousand Seven Hundred Three and 35-100 (\$8,703.35) Dollars (Tr. page 28.)

Russell was not ignorant of what he was doing and certainly the officers of the bank were not ignorant, for these checks passed through the Bank and were subject to daily inspection and at times his checks were not paid because he was overdrawing his account, at other times he was permitted to overdraw his account.

The plain provision of the mortgage was broken and it was the duty of the Bank, from the beginning to have this money deposited in this Bank to its own credit day after day so the provisions of the mortgage could be carried out.

We have drawn the attention of the Court to the testimony showing that the Bank account of Russell was kept in his own name, and that the moneys paid into the Bank were withdrawn by him and none of it applied to the reduction of the mortgage indebtedness.

On page 93 of the transcript, Mr. Russell states:

“Q. After these amounts that were deposited in the Scandinavian American Bank to your credit subsequent to the giving of this chattel mortgage on the 29th day of June, 1915, were any of the moneys—deposited applied on the payment of this \$4165.00 note?

A. No.

Q. Or to another note that you gave to the Bank that was covered by this mortgage?

A. No.”

The purpose of the provision is perfectly plain; it

means that after paying the running expenses of the business, expenses of carrying on the business and his living expenses, the balance was to be deposited in the Bank daily and thereafter on the 10th of each month an accounting was to be had and at such time the proceeds of sales and collections, were to be turned over to the Bank and applied on the promissory note.

This provision of the mortgage was intended to keep the business of Russell on a cash basis and prevented him from using, except for the purposes heretofore mentioned, the moneys received from his business.

This was not done and he was allowed to spend his money as he pleased.

If daily the money had been paid into the Bank to the credit of the Bank, it could not have been checked out by Russell.

Counsel in their argument say of those large sums to which reference is made, "there was not a dollar at any time that Russell did not owe for current bills and the expense of carrying on his business of the provisions of the mortgage."

"The only inevitable conclusion to be drawn from the evidence is that, from the moment the mortgage was given to the date of the filing of the petition, in bankruptcy Russell did not have one penny of profit to apply on the mortgage debt, and because of the fact that the bank, knew of this condition no deposit of the proceeds of such sales of the mortgagee herein to the credit of the party of the "second part to apply on the note herein mentioned, was ever made. There was never any surplus to apply. Russell's receipts from day to day and more were covered by his debts. These had to be met in part at least, or go out of business." Brief pages 18-19.

This is the whole story in a nut shell. He was using the proceeds of the sales of merchandise not only to meet

current expenses and purchases of merchandise but to pay his indebtedness.

Counsel say that Russell did not have "One penny of profit to apply in reduction of the mortgage debt."

This is not the point in issue. The mortgage did not provide that profits were to apply on the reduction of the mortgage debt, but it provided that the proceeds of sales of merchandise less current expenses and money required for the purchase of merchandise were to be so applied, so that a corresponding reduction in the security would work a corresponding reduction in the indebtedness.

THERE WAS NO ACCOUNTING ON THE 10TH DAY OF EACH MONTH.

The next provision of the chattel mortgage provides in substance that at least once a month on or before the 10th of the month during the continuance of the mortgage Russell was to account to the Scandinavian American Bank, for all sales and collections made during the previous month and pay over to the Bank, at such times of accounting, the proceeds of such sales and collections to apply toward the payment of the promissory note, after deducting the actual and necessary expenses of carrying on the business, the actual and necessary living expenses of Russell and after deducting enough to pay bills falling due, for goods purchased to replenish said stock of merchandise. The testimony shows that there was never any written accounting and as a matter of fact it shows that no system of books was kept by Russell, at any time by means of which he could make such an accounting and none in fact was made.

The Bank knew that Russell was in difficulties and

that every attorney in town, as Mr. Moe puts it, was trying to collect from his (Tr. 64-75 and 76).

Mr. Moe testified that the Bank never made any examination of Russell's books (Tr. 86), that Russell never gave any financial statement in writing (Tr. 86), that Russell never gave any statement, in writing, on the 10th day of any month, during the time the chattel mortgage was in force. (Tr. 86.)

Russell testified that he kept no books of account or of his creditors. (Tr. 25-26-27).

Russell testified (On page 89-90 Tr.) that he never made any statement of his business dealings, in writing, that he made no verbal account but told them such things as they asked him (Tr. 89-90 Tr. 227).

Russell testified (Tr. 90) that he kept no books or other accounts of his daily receipts and sales and that he had no means of ascertaining, from books, the amount of his sales during any part of the month.

The attorneys for the Bank do not dispute this but they insist on Page 16 of their brief, the Bank was at all times able to determine the financial standing of Russell. Russell was not able to do so himself. Counsel state on Page 17 of their brief that Russell was not competent and was not able to draw up a formal report of his assets and liabilities.

On Page 15 of their brief counsel state that it was not incumbent upon them to install entirely a new system of "Bookkeeping". We do not make any such contention, but we do insist that this chattel mortgage called for a monthly accounting between Russell and the Bank, as such accounting is understood, and it should not be guesses and conjectures.

"Accounting is rendering or delivering a formal statement of one's dealings (1Cyc. 364)."

Account is a written statment of pecuniary transactions (1 A. & E. Enc. Law. Second Ed. 434)."

We submit that this is the kind of accounting that was contemplated by the provisions of the chattel mortgage in question.

We do not see that the citations by counsel in this connection (1 C. J. 596) help them in the least but they all bear out the theory of the above definition.

RUSSELL WAS PERMITTED TO PURCHASE AND HE PURCHASED MERCHANDISE ON CREDIT

The records show that there was a large amount of merchandise purchased from persons whose claims had been filed in this court, subsequent, to the giving of the chattel mortgage for which they have not received one dollar, either in cash or its equivalent. Russell knew it and knew the provisions of the chattel mortgage (Tr. 93-94).

It is claimed that the Bank did not know that he was purchasing merchandise on credit.

Mr. Moe, however, did know that he was purchasing merchandise on credit and he stated in his testimony that he expected him to do so (Tr. 84-85).

Independent of this however, our position is that the Bank was obliged to know, it assumed some obligation when it executed this chattel mortgage.

Had it received each month an accounting from Russell it would have shown what money he took in from the sales of merchandise, what money he paid out and how, what merchandise he had received during the month, and whether it was paid for or not.

All this merchandise went into the Lumber Yards of Russell. A portion was in there at the time he was adjudged a Bankrupt and now the Bank wants to put their

hands on the merchandise and take it to apply on the mortgage indebtedness. In other words because these subsequent creditors were foolish enough to give credit, notwithstanding the mortgage, was on record, then they should stand the loss.

They had a right to rely on the integrity of the Bank and that it would see to it that the mortgagor would comply with the provisions of the mortgage.

In commenting on this phase of the chattel mortgage, counsel for the Bank say:

“Admitting every contention of the objectors to be true still the facts show that the objectors with full knowledge of the mortgage which was of record in Sweet Grass County, shared in every payment made in alleged violation of its terms. To such as these it is submitted the doors of this Court ought to be closed.” (Brief, Page 22).

Counsel further say that these creditors are estopped.

The transcript shows the claims filed by these different creditors, that they were not residents of Montana and that their place of business in every instance, was outside of Sweet Grass County. There is nothing in the testimony to show that these creditors, living outside of Sweet Grass County and State of Montana, had actual notice of this chattel mortgage.

Even if we concede that the filing of the chattel mortgage would be constructive notice to these non-residents, who sold merchandise on credit to Russell, after the giving of the chattel mortgage; these sales to Russell made subsequently raise no question of estoppel against creditors whose claims have been filed for merchandise sold to Russell, prior to the giving of the chattel mortgage and these claims in amount are in excess of the value of the personal property covered by the chattel mortgage and

the assets of the estate, as we will hereafter show; some creditors received nothing, surely they have a right to complain.

We now desire to briefly draw the attention of the Court to the purchases of merchandise made subsequent to the giving of the chattel mortgage as shown by the proofs of claim offered in evidence and the testimony of Russell relating thereto.

It shows also that this merchandise was received by Russell, taken into and used in his business, and is a part of the property which passed into the hands of the trustee and which is now claimed by the Bank, under the provisions of the chattel mortgage. (Exhibit 45, claim of Pacific States Lumber Company, Tr. 142-144-149-151-161).

The amount of this claim is \$379.22.

Exhibit 50, claim of Bloedel Donovan Lumber Company (Tr. 151). The amount of this claim is \$621.56.

Exhibit 54, claim of Dakota Plaster Company (Tr. 174). The amount of this claim is \$49.40.

Exhibit 55, McKee Lumber Company (Tr. 179-181). The amount of this claim is \$494.64.

Exhibit 56. Claim of the Montana Coal & Iron Company (Tr. 185-186). The amount of this claim is \$162.92.

Exhibit 58. Claim of Standard Paint Company (Tr. 194-196). The amount of this claim is \$177.93.

These claims are for merchandise purchased subsequent to the giving of the chattel mortgage. They amount to \$1885.67. Two-fifths of the total claims filed and allowed, outside of the claim of the Bank and when we consider that the total deposit in the Bank as shown by Mr. Moe (Tr. 281) only amounted to \$8,700.00, this is quite a large item, especially when we take into consideration,

the value of his merchandise was estimated by Russell to be of the value of \$6,000.00 at the time of the giving of the chattel mortgage.

CREDITORS OF RUSSELL AT THE TIME OF THE GIVING OF THE CHATTEL MORTGAGE

The following claims will show, who were creditors of Russell at the time of the giving of the chattel mortgage, outside of the Bank and F. E. Russell, the father of the Bankrupt.

Exhibit No. 47, claim of Eureka Lumber Company (Tr. 144-146-178. The amount owing at the time of giving the chattel mortgage was \$681.60. The amount due at the time of the filing of the petition is \$342.43. (Tr. 276).

Exhibit 49. Claim of the Eclipse Paint and Manufacturing Co. (Tr. 147 and 182.) The amount of this claim is \$141.05; nothing paid on the claim since execution of mortgage.

Exhibit No. 46. Claim of Atlas Oil Company (Tr. 150-151-154). The amount of this claim is \$154.43. Seventy-five dollars paid on account since execution of mortgage.

Exhibit No. 51. Claim of the Northwestern Lumber & Shingle Company (Tr. 151 and 152). The amount of this claim is \$575.00; nothing paid since execution of mortgage.

Exhibit No. 52. Claim of McCormick Lumber Company (Tr. 152-153-166). The amount of this claim is \$750.50. Sixty-three (\$63) Dollars paid subsequent to execution of mortgage.

Exhibit No. 53. Central Door & Lumber Company (Tr. 169-170). The amount of this claim is \$528 94; nothing paid subsequent to the execution of mortgage.

Exhibit No. 57. Pacific Lumber Agency (Tr. 190). The amount of this claim is \$460.14; nothing paid after execution of mortgage.

Exhibit No. 59. Lndstrom Handforth Lumber Company (Tr. 200). The amount of this claim is \$151.35; One Hundred and Fifty Dollars paid subsequent to giving the mortgage.

The amount of these claims is \$3,103.84, for merchandise purchased prior to the giving of the chattel mortgage and owing at the time the chattel mortgage was given and only \$288.00 paid out of the proceeds of sales and it is claimed they shared in all payments made and are estopped.

MONEYS RECEIVED BY RUSSELL, FROM THE SALES OF MERCHANDISE, WERE CONVERTED BY HIM TO HIS OWN USE, WITH THE KNOWLEDGE AND CONSENT OF THE BANK.

We do not mean by this to be understood as claiming that Russell actually took this money and spent it himself but we will show that the proceeds of the sales of merchandise were used to pay indebtedness existing prior to the giving of the chattel mortgage and therefore was a conversion. This money should have been applied on the mortgage indebtedness.

Counsel at page 19 of their brief refer to this question, they say:

“No Court has ever before said that the payment of just debts is a fraud upon anyone.”

This is not the question. When Mr. Russell mortgaged to the Bank, his agreement with them and with his creditors was that he would first pay the Bank out of the proceeds of the mortgaged property and that is what he was obliged to do. He had no right with the consent of

the Bank to pay it to creditors other than the Bank, in any manner that he pleased.

We desire to briefly draw the attention of the Court to these payments of money, as shown by the checks, issued by Russell and introduced in evidence.

These checks were all paid by the Scandinavian American Bank, out of the account kept by Russell.

Exhibit No. 1. Check paid to J. B. Selters, an attorney, for \$262.00 (Tr. 95). The check shows from a notation on it, that it was for the account of a note due The Western Lumber Company, an indebtedness existing before the mortgage was given.

Exhibit No. 2. A loan made to C. W. Russell, a cousin of the Bankrupt, for \$60.00 (Tr. 95-97).

Exhibit No. 3. A check given to the Scandinavian American Bank for \$124.71(Tr. 97-98). The evidence shows that this was for interest owing the Bank prior to the giving of the chattel mortgage. The evidence also shows that when this check was given, the Bank permitted an over-draft, which was later made good.

Exhibit No. 4. A check for \$50.00 given John Ellingson for Life Insurance. (Tr. 99).

Exhibit No. 5. A check for \$100.00 in favor of the Montana Sash & Door Company. This was paid on open account (Tr. 101).

Exhibit No. 6 A check for \$100.00, payable to Fletcher & Evans on the account of Lindstrom Handforth Company (Tr. 102 and 103). Fletcher & Evans were attorneys and a notation on the check before it was cashed by the Bank says:—"Lindstrom Handforth bill, this check was for merchandise purchased prior to the giving of the chattel mortgage."

Exhibit No. 7. A check for \$60.00 to C. W. Russell, a cousin of the debtor (Tr. 103-4).

Exhibit No. 8. A check for \$50.00 to the Bellingham National Bank (Tr. 104-5). A payment on note for lumber.

Exhibit No. 9. (Tr. 106). A check for \$10.00 in favor of C. W. Allen, Sec. An endorsement on notation on the check shows it was for "Chautauqua" and was a contribution.

Exhibit No. 10. A check for \$50.00 to J. B. Selters (Tr. 106-7). Mr. Selters was an attorney at Big Timber and this was on the account of the Northwestern Lumber Company for merchandise purchased prior to the giving of the chattel mortgage.

Exhibit No. 11. A check for \$50.00, in favor of the Eureka Lumber Company (Tr. 107-8). A notation on the check shows that it was on open account. Actual notice to the Bank, that he was not paying cash for what he was purchasing.

Exhibit No. 12. A check for \$50.00 to J. B. Selters, on account of the note of the Northwestern Lumber Company. Mr. Selters is an attorney at Big Timber, known to the Bank. (Tr. 108-9).

Exhibit No. 13. Check for \$58.55, given to the Eureka Lumber Company, (Tr. 109). A notation shows that it was on account.

Exhibit No. 14 and 15. Each check is for \$25.00, given to J. B. Selters on the account of the Western Lumber Company, for merchandise purchased prior to the giving of the chattel mortgage. (Tr. 110-112).

Exhibit No. 16. A check for \$50.00, given to the Bellingham National Bank. At the bottom, the check shows that it was a payment, on note to Northwestern

Lumber and Shingle Company (Tr. 112-113), for merchandise purchased prior to the giving of the chattel mortgage.

Exhibit No. 17. A check for \$50.00 payable to Fletcher and Evans Co. (Tr. 113-114). A notation on the check, "on Lindstrom Handforth account."

Exhibit No. 18. A check to Joe Meister \$25.00. A notation on the check shows that it was final payment on note given for mare. Indebtedness existed at the time of the giving of the chattel mortgage. (Tr. 114-115).

Exhibits 19 and 20. Checks for \$25.00 and \$16.00, given to J. B. Selters, an attorney. On a note to the Western Lumber Company. (Tr. 115-117).

Exhibit No. 21. A check given to H. Uttermohl (Tr. 117-118). A notation on the check shows that it was one half payment and interest on some real property purchased.

Exhibit No. 22. A check for \$32.50, given to the McCormick Lumber Company (Tr. 118-119). A notation on the check shows that it was on account.

Exhibit No. 23. A check given to the Bellingham National Bank for \$25.00 (Tr. 120 and 121). A notation on the check shows it is a payment "On note of Northwestern Lumber Company."

Exhibit No. 24. A check in favor of H. Uttermohl for \$50.00 (Tr. 121). A notation on the check shows it is a final payment for real estate purchased.

Exhibit No. 25. A check for \$52.49, paid to the Scandinavian American Bank (Tr. 122-123). This is a payment to the Bank for a loan made subsequent to the giving of the chattel mortgage, evidenced by a note for which a chattel mortgage on an automobile was given as security.

The Bank itself was not averse to funds being diverted from their regular course.

Exhibit No. 26. A check for \$40.00 paid to L. Powell. Notation on the check, "To apply on note." (Tr. 124).

Exhibit No. 27. A check for \$20.00 drawn in favor of Frank Lamp, an attorney, on an account held by Mr. Lamp for collection. (Tr. 125).

Exhibit No. 28. A check for \$50.00, drawn in favor of J. B. Selters, attorney. A notation on the check, "On account of Eureka Lumber Company." (Tr. 126).

Exhibit No. 29. A check for F. E. Lamp, \$20.00 (Tr. 126-127), an attorney.

Exhibit No. 30. A check for \$32.10, drawn in favor of the Row James Glass Co. A notation on the check shows, "Balance in full, for plate glass" (Tr. 127). This was for merchandise purchased after the giving of the chattel mortgage but it shows that Russell was purchasing on credit.

Exhibit No. 31. A check given to the Oliver Typewriter Company for \$15.00 (Tr. 129). A notation on the check shows balance in full for machine.

Exhibit No. 32. A check given to A. W. Miles Lumber Company \$39.85. Tr. 131-2). A notation on the check shows "Part payment on cement."

Exhibit No. 33. A check payable to the Bankrupt himself for \$65.00. (Tr. 131).

Exhibit No. 34. A check payable to the A. W. Miles Lumber Company for \$25.00. A notation on the check, "On account." (Tr. 132).

Exhibit No. 35. A check payable to A. W. Miles Company for \$25.00 (Tr. 133). A notation on the check, "Balance on account in full."

Exhibit No. 36. A check payable to J. B. Selters,

an attorney, (Tr. 133 and 134). A notation on the check, "On Eureka account."

Exhibits 39 and 45 (Tr. 136 to 142) show checks payable to the City Meat Market. These were all for the living expenses of the Bankrupt. But this method of paying them was a violation of the provisions of the chattel mortgage.

The amount as shown by these checks altogether is a little over \$1,800.00. Money diverted, the proceeds of the sale of merchandise from the course intended to be pursued, under the provisions of the chattel mortgage, used solely for the purpose of keeping the business going at all costs.

It will not do to say that the Bank did not know, for all of these checks were paid through the Bank and the notations plainly told the Bank what Russell was doing and the course he was pursuing in his business.

Had the proceeds of sales been deposited daily in the Bank to the credit of the Bank, this could not have happened. It will not do to say that Russell might have made these payments by keeping the money in his possession and then the Bank would have known nothing about it, for he pursued a course that gave the Bank knowledge.

Had the Bank insisted on this monthly accounting all these things would have been brought to light and prevented.

The Montana Supreme Court speaking of the provision allowing the mortgagee to retain his living expenses says:—Page 443 Montana Reports, *Noyes vs. Ross*, *supra*.

"All such agreements, however, whether in parol or included in the mortgage itself, should be closely scrutinized, for they force the transaction involved close to the line where the law will say that parties have adopted a means whereby creditors are hindered

and delayed; yet notwithstanding all this, such mortgages are not necessarily of such a character that the law will conclusively imply fraud, if none actually exists, but will leave the question of good faith to be tried as one of fact."

The Court says on page 448:—

"The presence or absence of vice in this agreement is tested by the inquiry whether the sales were to be made in the interest of the mortgagor, and the proceeds controlled by him, so that they might not be applied upon the mortgage, or whether they were to be made in strict and faithful execution of a real trust, so that every decrease of the security should work a corresponding reduction of the debt."

The case of *Rocheleau v. Boyle*, decided by the Supreme Court of our own state and reported in 11 Mont. page 451, 28 Pac. 875, is an instructive case on the subject of fraud in chattel mortgages. In this case a mortgage was given covering a stock of merchandise among other things, without any provision permitting the mortgagor to sell the merchandise, this he did however with the constructive and actual knowledge of the mortgagee. the mortgage being made in good faith, it was held valid as to everything except the merchandise sold, the proceeds of which were diverted.

The Supreme Court says on page 459:—

"One sold and the other bought of the goods in question; one continued to sell and the other was fully cognizant of the selling and the carrying on of the business openly as before the mortgage was executed, and without objection or remonstrance from the mortgagee; and this conduct appears to have been by their own violation, because there is no showing that either acted under duress, delusion or insanity."

The same thing was done in the present case, sales made without any accounting and the money placed in

the bank of the mortgagee to the credit of the mortgagor in violation of the provisions of the mortgage, and checked out by Russell.

Again on Page 465, the Court says:—

“What was meant was, that such an instrument should not be used to enable the mortgagor to continue in business as theretofore, with full control of the property and business, and appropriating to himself the benefits thereof, and all the while holding the instrument as a shield against the attacks of unsecured creditors.”

On page 469, the Court says:—

“Now, if a mortgage of goods be made as provided by statute leaving possession with the mortgagor, and it be understood, agreed or knowingly permitted (for if it is knowingly permitted, it is understood and agreed) to the mortgagor to place the mortgaged goods on sale, not subject to the mortgage, to be sold, carried away or consumed, and the proceeds used without reference to the mortgage, this arrangement annuls every vital element of the mortgage so far as concerns the goods to which such arrangement or permission extends. The mortgage under such circumstances, becomes a mere sham, a mere appearance, a delusion, asserting in form what is not in fact, as admitted by the conduct of the parties. The possession does not remain nor does the property remain. It is shifted over to those who will come and buy and is carried away without respect to the mortgage, and the proceeds devoted to purposes other than to answering for the debt mentioned in the mortgage. The parties to such an arrangement have departed from the observance of a statutory requirement as to the property to which such arrangement or permission applies, and we think there ought to be no hesitation in holding the mortgage void as to property so dealt with; or in other words, that such property is put out from under such mortgage by the conduct of the parties in relation to it.

This language is again repeated word for word in the case of *Stevens v. Curran*, 28 Mont. page 366; 72 Pac. 753.

In *Heilbronner v. Lloyd*, 17 Mont. page 299, on page 307, the court says in an opinion by Justice Hunt, now a member of this Court:—

“Whether or not the mortgage was made in good faith, and whether or not it was agreed between the mortgagor and the mortgagee that the mortgagor might sell the goods at retail and apply the proceeds to liquidate the debt, and such agreement was a condition **entered into in good faith between the parties**, was likewise a question of fact.”

It is contended by counsel that because Russell testified that he had no money with which to pay the Bank, to apply on the mortgage debt, this is conclusive. We do not think so, for the only way this could be determined, is by an accounting.

However, from the testimony of Mr. Moe, the cashier of the Bank, who produced the ledger account of Russell with the Bank which was in his hands, it appears that there was daily a balance to the credit of Russell, (Tr. 241). Mr. Moe was examined as to the balance on hand between the first and the 11th days of each month and a reference to the transcript (pages 241 to 249) will show what these balances were and at times the daily balance was almost \$500.00.

Had this account been kept in the name of the Bank or rather this money deposited to the credit of the Bank, it could not have been withdrawn at the will and pleasure of Russell. This situation however, was certainly notice to the Bank of the manner in which the business was being handled, it was put on inquiry, not only to protect itself but other creditors.

We contend that this showing is to the effect that there was money on hand which could have been applied

on the note secured by the mortgage. Russell is not to be the sole judge of this matter.

While on this question of the Bank account, we draw attention to the fact that on December 1st there was an overdraft of \$78.35. (Tr. 245) Mr. Moe states that this was not an additional loan on credit. The fact remains however it was notice to the Bank that Russell was not doing a cash business and it certainly is an indication that the Bank was permitting Russell to handle things to suit himself.

There were overdrafts on January 14th, 1916, and September 28, 1915 (Tr. 248). Mr. Moe testified (Tr. 248) that at all periods between June 29, 1915, and February 11, 1916, with these three exceptions, there was always a balance to the credit of Russell, at the close of each day's business, and inspection of the Exhibit, will show how much.

Mr. Ellingson, the trustee (Tr. 247) states that all the money he has on hand is \$2,600 and that this includes the proceeds from the sale of the merchandise claimed by the bank and this also includes \$350.00, part of the proceeds of the sale of the real property, which is being held to cover a proportion of the share of the expenses of administration. So it will be seen that there is not sufficient assets even to pay claims filed and allowed, if the chattel mortgage is set aside.

It is admitted (Tr. 276 and 277) what claims have been filed with the referee. They total \$4,989.91. This is independent of the claim of the Bank, Aulutman Tailor Manufacturing Company and any claims that may be hereafter filed. In this summary the claim of Blodel Donovan Lumber Company should be \$621.56 and not \$64.56 (Tr. 151).

Mr. Ellingson stated after examining the accounts receivable of Russell, the amount of the same being stipulated, that there was \$1611.72, unpaid, sold on a credit longer than thirty days. (Tr. 277-278). These are the accounts, proceeds of the sale of merchandise, sold for the account of the bank; if the chattel mortgage be a valid lien. If it is held void, we contend of course that the bank will only share equally with the other creditors in all assets.

Some reference is made by counsel to the fact that Russell received from his ranch, and what is known as the Springdale business something like \$600.00 which was paid into the bank and checked out by Russell. The Springdale business was a branch of his Big Timber business. Everything that went to Springdale was either sent from Big Timber or else was paid for by Russell at Big Timber, or is a liability of his Big Timber business. In other words the Springdale business was not a separate and distinct business but was covered by the chattel mortgage (Tr. 218-9-331-333).

The only money that he received from the ranch was \$200.00 to \$250.00 (Tr. 206). This could make very little difference in the situation.

All the merchandise bought by Russell subsequent to the giving of the chattel mortgage was received by him in his Lumber Yards, used in his business and what not sold by him passed into the hands of the trustee (Tr. 283).

The argument of counsel on page 20 of the brief is that because the Bank allowed the mortgagor to pay some of his creditors, contrary to the provisions of the chattel mortgage, instead of the Bank playing "Whole Hog", no one has a right to complain, even if the provisions of the chattel mortgage were violated. Under the authorities,

the Bank had no right to do this for the chattel mortgage placed the property beyond the reach of creditors, until the bank was paid. The Bank had no right to let Russell be generous to some creditors to the exclusion of others.

On page 23 of the brief the Bank, through its Counsel says: "The objectors who come into Court here and complain of the Bank's loan are the very creditors who have shared in the fruits of the loan, made by the Bank under the mortgagee."

The claims filed do not show that the creditors filing them, received any portion of the money for which the principal note was given and as a matter of fact the evidence does not disclose what the mortgage indebtedness was for, and even if some of these creditors did receive a part of the money evidenced by the principal note, that is no reason why subsequent to the giving of that note and the security, the provisions of the mortgage should not be complied with.

Counsel further say on page 23 of their brief, "If the bank in good faith has advanced money to Russell to keep his business going for more than eight months, these creditors have thrown him into bankruptcy and by so doing ended their chances of receiving payment in full. Yet they now ask the Bank, 'to hold the sack.' They have taken all of the proceeds of the business, that they could reach with one hand; with the other they now ask a court of equity and good conscieoce to give them what is rightfully the bank's security. They make no offer of restitution; give no explanation for their own participation in the breaches of the mortgage condition, which they allege. If ever there was a case where 'Clean Hands' are demanded in a court of equity, this contest is one."

This argument to say the least is amusing. At the time the mortgage was given to secure indebtedness, then

due to the Bank, there were other creditors to a large amount, and it would look as if the Bank at that time intended to let the other creditors "Hold the Sack."

Counsel claim that the creditors or the trustee acting for them has taken all the proceeds of the business they could reach and now ask a Court of Equity to give them what is rightfully the Bank's security.

The trustee only asks that these proceeds be applied so that all creditors would participate and that the Bank will not take everything.

This brief has been extended longer than it ought to have been but we feel that all of the allegations of the objections have been sustained and the order of the referee, affirmed by the District Judge, under the well known rule should be affirmed.

WHERE THE TESTIMONY IS CONFLICTING, THE FACTS WILL NOT BE INQUIRED INTO.

"Where the testimony is conflicting and the findings of fact of the Referee and the District Judge are the same, the facts will not be inquired into by an appellate court, unless there is plain error."

In re. Door (Ninth Circuit) 28 Am. B. R. 505 and cases cited.

"The findings of fact of a referee, affirmed by the District Court, will not be disturbed on appeal where supported by substantial evidence."

Wilson vs. Continental Building & Loan Association (Ninth Circuit) 37 Am. B. R. 444.

"Where the referee and the District Court have considered conflicting evidence and made a finding or decree thereon, that finding is presumptively right, and it should not be reversed unless it clearly appears that they have fallen into some error of law or have made some serious mistake of fact."

First National Bank of Philadelphia vs. Abbott
✓ (Eighth Circuit) Am. B. R. 436.

"But the rule is well established that where two courts have concurred in findings of facts in a suit in equity, this court will accept those findings, unless clear error is shown."

Page vs. Rogers (Sup. Ct. U. S.) 21 Am. B. R. 498.

In re Sweeney (Sixth Circuit) Volume 21, Am. B. R. 867
Canner vs. Webster Tapper Company (First Circuit) 21 Am. B. R. 872.

"A referee's findings of fact affirmed by the District Judge, will not be disturbed unless clearly erroneous."

In re. Noyes Bros. (First Circuit) 11 Am. B. R. 506.

Respectfully submitted,

Frank A. Arnold
.....
Attorney for Trustee and Respondent.

Service of the within brief and a copy acknowledged

this.....day of October, A. D. 1917.

.....

.....

Attorneys for Petitioner.

United States
Circuit Court of Appeals ✓

For the Ninth Circuit.

WILLIAM GLADSTONE, alias WILLIAM
VINES and MORRIS FRIEDLANDER,
alias H. FRANKLIN,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Southern District of California,
Southern Division.

Filed

AUG 30 1917

F. D. Monckton,

Clerk.

United States
Circuit Court of Appeals
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court of the United States, for the
Southern District of California, Southern Division,
Ninth Circuit.*

No. 1063—CRIM.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM VINES and H. FRANKLIN,

Defendants.

Writ of Error.

United States of America,—ss.

The President of the United States of America to
the Honorable the Judge of the District Court
of the United States for the Southern District
of California, Southern Division, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
the said District Court before you, between William
Vines and H. Franklin, plaintiffs in error, and the
United States of America, defendant in error, a
manifest error hath happened to the great damage
of said William Vines and H. Franklin, plaintiffs in
error, as by their complaint appears:

We being willing that error, if any hath happened,
should be duly corrected, and full and speedy justice
done to the parties aforesaid, in this behalf, do com-
mand you, if judgment be therein given, that then,
under your seal, distinctly and openly, you send the
record and proceedings aforesaid with all things con-
cerning the same to the United States Circuit Court
of Appeals for the Ninth Circuit, together with this

Writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of [4*] Appeals to be then and there held, that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 2d day of October, in the year of our Lord one thousand nine hundred and sixteen.

[Seal] WILLIAM M. VAN DYKE,
Clerk of the District Court of the United States for
the Southern District of California.

By Leslie S. Colyer,
Deputy Clerk.

The above Writ of Error is hereby allowed.

OSCAR A. TRIPPET,
District Judge.

I hereby certify that a copy of the within Writ of Error was on the 6th day of October 1916, lodged in the clerk's office of the said United States District Court, for the Southern District of California, Southern Division, for said defendant in error.

WILLIAM M. VAN DYKE,
Clerk of the District Court of the United States
for the Southern District of California.

By Chas. N. Williams,
Deputy Clerk. [5]

[Endorsed]: No. 1063—Crim. In the United States District Court, for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. William Vines and H. Franklin, Defendants. Writ of Error. Filed Oct. 2, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [6]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1063—CRIM.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM VINES and H. FRANKLIN,

Defendants.

ORDER ALLOWING WRIT OF ERROR AND
SUPERSEDEAS.

Citation.

United States of America,
Southern District of California,
Southern Division,—ss.

To the United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit to be held at the city of San Francisco, in the State of California, within thirty days from date hereof, pursuant to a Writ of Error on file in the clerk's office of the District Court of the United States, for the Southern District of Califor-

nia, Southern Division, in that certain cause numbered 1063—Crim. in said District Court, wherein William Gladstone, *alias* William Vines and Morris Friedlander *alias* H. Franklin are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment given, made and entered against the said William Gladstone, *alias* William Vines and Morris Friedlander, *alias* H. Franklin, plaintiffs in error, in said Writ of Error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

[7]

WITNESS, the Honorable OSCAR TRIPPET, United States District Judge for the Southern District of California, this 2d day of October, in the year of our Lord one thousand nine hundred and sixteen, and of the Independence of the United States the one hundred and fortieth.

OSCAR A. TRIPPET,

District Judge. [8]

[Endorsed]: No. 1063—Crim. In the District Court of the United States for the Sou. Dist. of California. United States of America, Plaintiff, vs. William Vines and H. Franklin, Defendants. Citation. Filed Oct. 2, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk.

Copy of within Citation received this 2d day of October, 1916.

ROBERT O'CONNOR,

Asst. U. S. Atty. [9]

Names and Addresses of Attorneys.

For Plaintiffs in Error:

A. I. MORGANSTERN, Esq., 401-406 Timken Building, San Diego, California, and PAUL W. SCHENCK, Esq., 619-26 Homer Laughlin Building, Los Angeles, California.

For Defendants in Error:

ALBERT SCHOONOVER, Esq., United States Attorney, and ROBERT O'CONNOR, Esq., Assistant United States Attorney, Los Angeles, California. [10]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

No. 1063—CRIMINAL.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM VINES, True Name ALEXANDER GLADSTONE, and H. FRANKLIN, True Name MORRIS FRIEDLANDER,

Defendants. [11]

In the District Court of the United States, in and for, the Southern District of California, Southern Division.

Indictment.

At a stated term of said court, begun and holden at the city of Los Angeles, county of Los Angeles,

within and for the Southern Division of the Southern District of California, on the second Monday of July, in the year of our Lord, one thousand nine hundred and fifteen;—

The Grand Jurors of the United States of America, chosen, selected and sworn, within and for the Division and District aforesaid, on their oath present:

That William Vines and H. Franklin, whose full and true names are, and the full and true name of each is, other than as herein stated, to the Grand Jurors unknown each late of the Southern Division of the Southern District of California, heretofore, to wit, on the 23d day of December, in the year of our Lord one thousand nine hundred and fifteen, in the County of San Diego, within the Southern Division of the Southern District of California and within the jurisdiction of this Honorable Court, did knowingly, unlawfully, wilfully and feloniously have in their possession, receive, conceal, transport and facilitate the transportation and concealment of a quantity of opium prepared for smoking, which said opium was then and there contained in one hundred eighty cans of the size and style commonly denominated five-tael, and which said opium had been imported into the United States subsequent to the first day of April, 1909, contrary to law, all of which was well known to the said William Vines and H. Franklin at the time they so received, concealed, transported and facilitated the [12] transportation and concealment of said opium.

Contrary to the form of the Statutes of the United

States in such case made and provided, and against the peace and dignity of the said United States.

ALBERT SCHOONOVER,

United States Attorney.

CLYDE R. MOODY,

Assistant U. S. Attorney.

[Endorsed]: No. 1063—Crim. United States District Court, Southern District of California, Southern Division. The United States of America, vs. William Vines and H. Franklin. Indictment for Viol. Sec. 2, Act Jan. 17, 1914. Having in Possession, Receiving, etc., Smuggled Smoking Opium. A True Bill. Edward B. Tufts, Foreman. Presented and filed in open court, this 7th day of January, A. D. 1915. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. ———, United States Attorney. [13]

At a stated term, to wit, the January Term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the City of Los Angeles, on Monday, the seventeenth day of January, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 1063—CRIM. S. D.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

WILLIAM VINES and H. FRANKLIN,
Defendants.

Minutes—January 17, 1916—Trial.

This cause having been called at this time for the arraignment of defendants; Clyde R. Moody, Esq., Assistant U. S. Attorney, appearing as counsel for the United States; defendants being present in court, with their counsel, A. J. Morganstern, Esq., and John J. Sullivan, Esq.; and defendant Wm. Vines having been called and arraigned, having stated that his true name is Alex Gladstone, having waived the reading of the indictment, and, on being required to plead to said indictment, said defendant having pleaded not guilty as charged therein, which plea is now by order of the Court entered herein; and defendant H. Franklin having been called and arraigned, having stated that his true name is Morris Friedlander, having waived the reading of the indictment, and, on being required to plead thereto, having pleaded not guilty as charged therein; thereupon, on motion of Clyde R. Moody, Esq., Assistant U. S. Attorney, of counsel for the United States, it is ordered that this cause be, and the same hereby is continued until Monday, the 13th day of March, 1916, at 10 o'clock A. M., for the trial thereof, at San Diego, California, before the Court and a jury to be impanelled. [14]

At a stated term, to wit, the September Term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room thereof, in the city of San Diego, on Tuesday, the twelfth day of September, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 1063—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM VINES, True Name ALEXANDER GLADSTONE, and H. FRANKLIN, True Name, MORRIS FRIEDLANDER,

Defendants.

Minutes—September 12, 1916—Trial (Continued).

This cause coming on at this time to be tried before the court and a jury to be impanelled; Robert O'Connor, Esq., and Clyde R. Moody, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants being present on bail, with their counsel, A. J. Morganstern, Esq., and Paul Schenck, Esq.; John P. Doyle, one of the official shorthand reporters of this court, being present and acting as such; and the court having ordered that the trial proceed, and that a jury be impanelled herein; and the following twelve (12) petit jurors having been duly drawn, called and sworn on *voir dire*, to wit: Wm.

L. Thompson, Adolph Muehleisen, Fred T. Scripps, Albert J. Stokes, Alex. Pearson, W. J. S. Browne, G. Landweer, Benjamin Pike Boone, John Martin, E. J. Swayne, W. C. Weitzel and Geo. M. Selwyn; and said twelve jurors in the box having been examined by counsel for the Government and by counsel for defendants, and passed for cause; and Albert A. Stokes having been challenged peremptorily by the Government and excused; and E. J. Swayne having been peremptorily challenged by the defendants and excused; and Wm. L. Thompson having been peremptorily challenged by defendants and excused; and Geo. M. Selwyn having been peremptorily challenged by the Government and excused; and Adolph Muehleisen having been challenged peremptorily by the defendants and excused; and Fred [15] T. Scripps having been challenged peremptorily by the Government and excused; and the six jurors remaining in the box, to wit: jurors Alex. Pearson, W. J. S. Browne, G. Landweer, Benjamin Pike Boone, John Martin and W. C. Weitzel, having been accepted by counsel for the Government and by counsel for defendants and duly sworn as jurors to try this cause; and the following six (6) petit jurors having been duly drawn, called, and sworn on *voir dire*, in the place of the six jurors excused, to wit: J. D. Lane, Geo. F. Otto, Julius A. Heilman, Wesley P. Hale, J. P. Haddock and Wm. F. Jungk; and said last-named six jurors having been examined by counsel for the Government and by counsel for defendants and passed for cause; and J. D. Lane having been challenged peremptorily by defendants and excused;

and Wesley P. Hale having been challenged peremptorily by defendants and excused; and Wm. F. Jungk having been challenged peremptorily by the Government and excused; and the remaining three jurors, to wit, jurors Geo. F. Otto, Julius A. Heilman and J. P. Haddock, having been accepted by counsel for the Government and by counsel for defendants and duly sworn as jurors to try this cause; and, in place of jurors Lane, Hale and Jungk, the following petit jurors having been duly drawn, called, sworn on *voir dire*, examined by counsel for the Government and by counsel for defendants and passed for cause, to wit, jurors Samuel W. Hackett, Thos. I. Butler and Gilbert C. Arnold; and Thos. I. Butler having been challenged peremptorily by the defendants and excused; and Gilbert C. Arnold having been challenged peremptorily by the defendants and excused; and Samuel W. Hackett having been accepted by counsel for the Government and by counsel for defendants and duly sworn as a juror to try this cause; and, in place of jurors Butler and Arnold, the following petit jurors, to wit, F. E. Gressler and Jos. R. Blackwell, having been duly drawn, called, and sworn on *voir dire*, examined by counsel for the Government and by counsel for defendants and passed for cause, and thereupon challenged peremptorily by defendants and excused; and, in place of said jurors [16] Gressler and Blackwell, the following two (2) petit jurors, to wit, jurors John Gould and David Hitchcock, having been duly drawn, called, sworn on *voir dire*, examined by counsel for the Government and by counsel for defendants and

passed for cause, and accepted respectively by counsel for the Government and by counsel for defendants and duly sworn as jurors to try this cause; and the impanellment of the jury being concluded, said jury as so impanelled and sworn consisting of the following named jurors, to wit:

JURY:

- | | |
|----------------------|------------------------|
| 1. Alex. Pearson, | 7. Geo. F. Otto, |
| 2. W. J. S. Browne, | 8. Julius A. Heilman, |
| 3. G. Landweer, | 9. J. P. Haddock, |
| 4. Benj. Pike Boone, | 10. Samuel W. Hackett, |
| 5. John Martin, | 11. John Gould, |
| 6. W. C. Weitzel, | 12. David Hitchcock. |

And the Court having admonished the jurors that, during the progress of this trial, they are not to permit other persons to speak to them about this case or anything connected with this case, nor themselves speak to other persons about this case or anything therewith connected, and that, until this case is given them for consideration under the instructions of the Court, they are not to speak to each other about this case or anything connected with it; it is, at the hour of 12:05 o'clock P. M., by the Court ordered that this cause be, and the same hereby is continued until the hour of 2 o'clock P. M., of this day, until which time the jurors are excused.

* * * * *

No. 1063—CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM VIRES, True Name ALEXANDER
GLADSTONE, and H. FRANKLIN, True
Nome MORRIS FREDLANDER,

Defendants.

This cause coming on at this time to be further tried before the Court and a jury duly impanelled herein; Robert O'Connor, Esq., and Clyde R. Moody, Esq., Assistant U. S. Attorneys, appearing [17] as counsel for the United States; defendants being present on bail, with their counsel, A. J. Morganstern, Esq., and Paul Schenck, Esq.; John P. Doyle, one of the official shorthand reporters of this court, being present and acting as such; and counsel for the respective parties having stipulated that the jury are present, and all of said jurors being present in court; and the indictment having been read to the jury by the clerk and defendants' pleas of not guilty having been announced to the jury by the clerk; and A. J. Morganstern, Esq., of counsel for defendants, having invoked the rule as to witnesses, it is ordered that all witnesses in this cause be excluded from the courtroom except when severally actually upon the witness-stand for the purpose of testifying; and Thos. H. Rynning and Wm. Landis and Horace U. Kennedy having respectively been called and sworn as witnesses on behalf of the United States, and hav-

ing given their testimony; and, in connection with the testimony of the last-named witness, the Government having offered an exhibit, which is admitted in evidence in its behalf, to wit, U. S. Ex. 1, Register of Hotel Cecil; and D. J. Davidson having been called and sworn as a witness on behalf of the United States, and having given his testimony; and, in connection with the testimony of said witness, the Government having offered an exhibit, which is admitted in evidence in its behalf, to wit, U. S. Ex. 2, Register of Hotel Panama; and Belle M. Riggle having been called and sworn as a witness on behalf of the United States, and having given her testimony; and, in connection with the testimony of said witness, the Government having offered two exhibits, which are admitted in evidence in its behalf, to wit, U. S. Ex. 3, Register of Hotel Castle Ray; and U. S. Ex. 4, Affidavit of Morris *Friedland*; and court, at the hour of 3:17 o'clock P. M., having taken a recess for 13 minutes; and now, at the hour of 3:30 o'clock P. M., court having reconvened; and counsel, defendants and shorthand reporter being present as before; and counsel for the respective parties having stipulated that the jury are present, and all of said jurors being present in court; and Earl [18] R. Fullerton having been called and sworn as a witness on behalf of the United States, and having given his testimony; and the Court having given the jury the usual admonition; and the jurors having thereupon, at the hour of 4 o'clock P. M., been excused until Wednesday, the 13th day of September, 1916, at 10 o'clock A. M.; and A. J. Morganstern, Esq., having moved the court that this cause is dismissed; it is thereupon

by the Court ordered that *that* defendants' motion for a dismissal of this cause be, and the same hereby is denied, to which ruling of the Court, on motion for a dismissal of this cause be, and the same hereby is denied, to which ruling of the Court, on motion of counsel for defendants and by direction of the Court, exceptions are hereby noted herein on behalf of said defendants; and proposed instructions to the jury having been considered and discussed by the Court and counsel; it is, at the hour of 4:15 o'clock P. M., ordered that this cause be, and the same hereby is continued for further trial until Wednesday, the 13th day of September, 1916, at 10 o'clock A. M.

[19]

At a stated term, to wit, the September Term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of San Diego, on Wednesday, the thirteenth day of September, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable OSCAR A. TRIPPETT, District Judge.

No. 1063-CRIM. S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

ALEXANDER GLADSTONE, Indicated as WILLIAM VINES, and MORRIS FRIEDLANDER, Indicated as H. FRANKLIN,
Defendants.

Minutes—September 13, 1916—Trial (Continued).

This cause coming on this day to be further tried before the court and a jury heretofore duly impanelled herein; Robert O'Connor, Esq., and Clyde R. Moody, Esq., Assistant U. S. Attorneys appearing as counsel for the United States; defendants being present on bail, with their counsel, A. J. Morgestern Esq., and Paul Schenck, Esq.; John P. Doyle, one of the official shorthand reporters of this court, being present and acting as such; and counsel for the respective parties having stipulated that the jury are present, and all of said jurors being present in court; and Earl R. Fullerton, a witness heretofore sworn as a witness on behalf of the United States, having been recalled as a witness on behalf of defendants, and having given his testimony; and W. C. Carse having been called and sworn as a witness on behalf of defendants, and having given his testimony; and Morris Friedlander, one of the defendants, having been called and sworn as a witness on behalf of defendants, and having given his testimony; and defendants having rested; and the testimony being closed; and the Court having given the jury the usual admonition; and Court thereupon, at the hour of 10:54 o'clock A. M., having taken a recess for seven minutes; and now, at the hour of 11:01 o'clock A. M., court having reconvened; and [20] defendants, counsel and shorthand reporter being present as before and counsel for the respective parties having stipulated that the jury are present, and all of said jurors being present

in court; and this cause having been argued to the jury, on behalf of the Government, by Clyde R. Moody, Esq., Assistant U. S. Attorney, of counsel for the United States, and on behalf of defendants by A. J. Morganstern, Esq., of counsel for defendants and on behalf of the Government in reply by Robert O'Connor, Esq., Assistant U. S. Attorney, of counsel for the United States; and the court having given the jury the usual admonition; and court thereupon, at the hour of 11:57 o'clock A. M., having taken a recess until the hour of 2 o'clock P. M. of this day,

And now, at the hour of 2 o'clock P. M., Court having reconvened; and defendants and shorthand reporter being present as before; and counsel for the respective parties being present as before, except that Clyde R. Moody, Esq., Assistant U. S. Attorney, does not at this time appear as one of the Government's counsel; and counsel for the respective parties having stipulated that the jury are present, and all of said jurors being present in court; and the Court having read to the jury its written instructions; and two court bailiffs (who are also Deputy U. S. Marshals) having been duly sworn to take charge of the jury; and the jury, at the hour of 2:15 o'clock P. M., having retired in charge of said sworn officers to consider their verdict; and the jury, at the hour of 2:57 o'clock P. M., having come into court; and defendants, counsel and shorthand reporter being present as at the convening of court at 2 o'clock P. M.; and all of said jurors being present in court;

and the jury having been asked if they have agreed upon a verdict, and having replied that they have not so agreed, and, at the request of the jury, the testimony of two witnesses having been read to the jury by the shorthand reporter, from the notes taken by him; and the jury, at the hour of 3:38 o'clock P. M., having again retired in charge of said sworn officers, further to consider their verdict; and the jury, at the hour of 4:25 o'clock P. M., [21] having again come into court; and defendants, counsel and shorthand reporter being present as before; and counsel for the respective parties having stipulated that the jury are present, and all of said jurors being present in court; and the jurors having been asked if they have agreed upon a verdict, and having by their foreman replied that they have so agreed, and having been required to present their verdict, and their verdict having been read by the clerk; now, by direction of the court, said verdict is filed and recorded by the clerk, said verdict as so recorded being as follows, to wit:

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1063—CRIM.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

ALEX GLADSTONE, Indicated as WILLIAM
VINES, and MORRIS FRIEDLANDER,
Indicted as H. FRANKLIN,

Defendants.

Instructions of the Court to the Jury.

We, the jury duly impanelled in the above-entitled case, find the defendant, Alex Gladstone, indicted as William Vines, guilty as charged in the indictment, and the defendant, Morris Friedlander, indicted as H. Franklin, guilty as charged in the indictment.

San Diego, September 13th, 1916.

J. P. HADDOCK,

Foreman.

The jury recommends however, Morris Friedlander to the mercy of the court.

J. P. HADDOCK,

Foreman.

And said verdict having been read to the jury as so recorded, and the jurors having said that it is their verdict, it is now by the Court ordered that said jurors be, and they hereby are excused for the term and discharged, and it is further ordered that the U. S. Marshal for this District pay to said jurors their lawful fees for attendance and travel; and Robert O'Connor, Esq., Assistant U. S. Attorney, having moved for an increase of the bail of defendant Friedlander, it is by the Court ordered that said motion for an increase of bail of defendant Friedlander be, and the same hereby is denied; whereupon, good cause appearing therefor, it is ordered that for the sentence of defendants this [22] cause be, and the same hereby is continued until Monday, the 25th day of September, 1916, at 10 o'clock A. M., at Los Angeles, California, defendants in the meantime to remain at large upon their present bail.

[23]

There are two defendants on trial here. In these instructions, I have used the singular number instead of the plural, that is to say, I have used the word "defendant" throughout the instructions, but you shall consider that the instructions I give you relate to each defendant unless the contrary is specially pointed out in the instruction.

You shall decide this case upon the evidence introduced in the case, and not stricken out, and upon these instructions. Counsel have been permitted to argue the case for the plaintiff and for the defendant. This is for the purpose of aiding you to arrive at a verdict by understanding the evidence and the belief of counsel as to the guilt or innocence of the defendant, should have no weight with you in considering your verdict, but you should consider the evidence alone and these instructions in determining the guilt or innocence of the defendant. [24]

Instruction No. —.

You are instructed that the statute of the United States makes it unlawful for any person to fraudulently or knowingly transport, conceal, receive, buy, sell, or in any manner facilitate the transportation, concealment and sale of such opium, preparation or derivative thereof after importation knowing the same to have been imported contrary to law; and the law provides that on and after July 1, 1913, all smoking opium, or opium prepared for smoking found within the United States shall be presumed to have been imported after the first day of April, 1909, after which date all such importation was prohibited, and the burden of proof shall be on the accused in

whose possession such opium may be found to rebut such presumption. The law further provides that whenever, on trial for violation of this section, the defendant is shown to have, or to have had possession of such opium, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury. [25]

Instruction No. —.

The burden of proof is on the Government, and the Government must prove the defendant guilty beyond a reasonable doubt, before you can return a verdict of "guilty."

The Court will attempt to define to you what is meant by a reasonable doubt. It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they can say, they feel an abiding conviction, to a moral certainty, of the truth of the charge.

All the presumptions of law independent of evidence are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arises from the doc-

trine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty—a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether.

Commonwealth vs. Webster, 59 Mass. 295.

This instruction has been specifically approved by the Supreme Court of the State of California in more than one hundred cases.

Judge. [26]

Instruction No. —.

You are instructed that upon the plea of “Not Guilty” the presumption of innocence of the defendant arises. That presumption accompanies him throughout the trial; it goes with you in your retirement to consider your verdict; it will avail to acquit the defendant unless it be overcome by sufficient proof of guilt. You must examine the evidence by the light of that presumption, and unless upon examining it you find it sufficiently strong to overcome

the presumption of innocence, he is entitled to an acquittal.

People vs. Winthrop, 118 Cal. 92. Decision
by Justice Van Fleet.

Judge. [27]

Instruction No. —.

When possession of the opium is shown in the defendant by the evidence beyond a reasonable doubt, then the law places upon him the defendant, the burden of explaining that possession to your satisfaction.

You are not to infer from this statement that he must satisfy your minds beyond a reasonable doubt of the innocence of his possession, but the doctrine of reasonable doubt as to whether you are so satisfied applies to this element of the case, as to any other element. The burden does not shift to the defendant until you are first satisfied beyond a reasonable doubt, from the evidence, of the defendant's possession of the opium in question.

Judge. [28]

You are instructed that if the evidence shows that a preparation of opium, such as is described in the complaint, was found in close proximity to the defendant, but under such circumstances as warrants an honest belief that such preparation was under the dominion or control of someone else other than the defendant, your verdict must be "Not Guilty."

Requested by defendant and —.

Judge. [29]

To warrant a conviction of the defendant he must be proven to be guilty so clearly and so conclusively that there is no reasonable theory upon which he can be innocent when all the evidence in the case is considered together.

Requested by the defendant and ———.

Judge. [30]

It is not your duty to look for some theory upon which to convict the defendant, but on the contrary, it is your duty and the law requires you, if you can reasonably do so, to reconcile any and all circumstances that have been shown, with the innocence of the defendant, and so acquit the defendant.

Requested by the defendant and ———.

Judge. [31]

You are instructed that you must not suffer yourselves to be prejudiced against the defendant because of the fact that he is charged with this offense, and you must not suffer yourselves to be led to convict the defendant for fear that a crime may go unavenged, or for the purpose of deterring others from the commission of like offenses.

No such argument or reason can be weighty enough to justify you in laying aside or ignoring that just and most humane rule of law which says that you must acquit the defendant unless every fact necessary to establish his guilt has been proven to you beyond a reasonable doubt.

Requested by the defendant and ———.

Judge. [32]

Every crime which is punishable under the law consists of certain prescribed essential elements and these essential elements must be proved to you beyond a reasonable doubt.

It is the law, that even though every essential element of an offense, except one essential element thereof, be proved so clearly and so conclusively that there is absolutely no doubt remaining in the minds of the jury as to those elements, still you must not suffer yourselves to convict the defendant as long as that one essential element remains unproved or so long as you entertain a reasonable doubt as to that one essential element.

You are not permitted to infer or to presume the existence of the one essential element remaining unproved, in such a case as I have mentioned, nor are you permitted to assume that because every essential element except one has been proved, the one unproved is more likely to exist than not to exist.

Requested by defendant and ———.

Judge. [33]

You are instructed that the defendant in this case is not to be presumed to know anything because he ought to have known it. The presumption of innocence with which the law clothes the defendant is sufficient to overcome a presumption which might prevail in a civil case that he knew because he ought to have known.

Requested by the defendants and ———.

Judge. [34]

You are instructed where circumstantial evidence is relied upon to establish the guilt of the defendant it is not only necessary that all the circumstances concur to show the facts so to be proved, but such circumstantial evidence must be inconsistent with any other rational conclusion.

If the evidence can be resolved either with the theory of innocence or with guilt the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted.

Requested by the defendant and ———.

_____,
Judge. [35]

Before you can convict the defendant upon any statement claimed by the officers to have been made by him to them, you must believe that he did in fact make such a statement, that it is true in fact, that it is consistent and harmonious with the other evidence in the case and that it was voluntarily and intelligently made.

Requested by the defendant and ———.

_____,
Judge. [36]

Instruction No. —.

You are instructed that you are the sole judges of the credibility of the witnesses, and in determining that credibility you may take into consideration the manner of the witness on the witness-stand, the likelihood or unlikelihood of the truth of his story, the opportunities apparent from the testimony which the witness may have for knowing the truth, and whether or no the testimony of the witness has

been successfully impeached; and if you believe from the evidence that any witness has wilfully testified falsely with respect to any material matter involved in his testimony, you should distrust the testimony of such witness, and you have a right to disregard it altogether.

Judge. [37]

Instruction No. —.

If you find from the testimony that any witness has been convicted of a felony, you are to regard such fact as affecting the credibility of the witness for truth, honesty and integrity, and while you are not to arbitrarily reject the testimony of a witness who has been convicted of a felony, such fact is to be considered by you in determining what credit, if any, you will give to the testimony of such a witness.

129 Cal. 258.

Judge. [38]

You are instructed that you are not to discuss, consider or permit to influence your verdict in this case, the fact that the defendant Gladstone has failed to become a witness before you. He has a right under the law to rely upon the failure of the prosecution to prove the charge against him and he is not to be prejudiced in your minds because he did not see fit to become a witness before you in his own behalf.

Requested by the defendant and —.

Judge. [39]

You are instructed that the testimony of the defendant Friedlander is not to be weighed or judged differently from that of any other witness, and that you have no right to disregard the testimony of the defendant on the grounds alone that he is the defendant and stands charged with the commission of a crime. He is presumed to speak the truth, and unless this presumption is destroyed by other evidence in the case, you should consider that he has spoken the truth. You should fairly and impartially consider his testimony with all other evidence in this case, and if from all the evidence you have a reasonable doubt as to his guilt, you should find him not guilty. In determining the weight and effect to be given to his testimony, in addition to noticing his manner of testifying, and the probability of his statements, taken in connection with all the evidence in the case, you may consider the situation under which he has testified, that is, his relation to the case and his interest in the result of the trial.

[40]

If, after a consideration of the whole case, any juror should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror so entertaining such doubt not to vote for a verdict of "guilty" nor to be influenced in so voting, for the single reason that a majority of the jurors or even all the other jurors should be in favor of the verdict of guilty. The defendant is entitled to the individual opinion of each and every juror and no juror should surrender his opinion merely because the other jurors disagree with him therein so long

as he has a reasonable doubt.

This does not mean that you shall not fairly and impartially discuss the whole case together in order that you may agree upon and render a true and just verdict, and it is your duty to so agree if you can conscientiously do so.

Judge. [41]

Instruction No. —.

The Court instructs you that you must determine from the evidence the guilt or innocence of the defendants separately—that one may be guilty and another may be innocent. You must apply the evidence to each and decide from the evidence, as applicable to each, whether either or both are guilty or innocent of the offense charged. You may convict both, or acquit both, or convict one and acquit the other.

Judge.

[Endorsed]: 1063—Crim. U. S. Dist. Court, So. Dist. Cal., So. Div. U. S. vs. Vines & Franklin. Instructions Given by the Court. Filed Sept. 13, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [42]

The law presumes the defendant to be innocent of the commission of any crime and this presumption continues in his favor throughout the trial of the case step by step, and goes with you into the jury-room to aid you in the consideration of the evidence produced before you, and the defendant is at all times to be by you presumed to be innocent of any crime

charged against him in the indictment herein, until his guilt is established to your entire satisfaction and beyond a reasonable doubt. And if the evidence in this case does not satisfy your minds beyond a reasonable doubt, of the guilt of the defendant, or does not prove beyond a reasonable doubt any one of the elements necessary to constitute the crime or crimes charged in the indictment, you must acquit the defendant.

Requested by the defendant and _____,

Judge. [43]

You are instructed that the testimony of the defendant Friedlander is not to be weighed or judged differently from that of any other witness, and that you have no right to disregard the testimony of the defendant on the grounds alone that he is the defendant and stands charged with the commission of a crime. He is presumed to speak the truth, and unless this presumption is destroyed by other evidence in the case, your oaths require you to find that he has spoken the truth. You should fairly and impartially consider his testimony with all other evidence in this case, and if from all the evidence you have a reasonable doubt as to his guilt, you should find him not guilty.

_____,
Judge.

[Endorsed]: 1063—Crim. U. S. Dist. Court, So. Dist. Cal., So. Div. United States vs. Vines & Franklin. Instructions Requested by Defendants.

Filed Sept. 13, 1916. Wm. M. Van Dyke, Clerk.
By Leslie S. Colyer, Deputy Clerk. [44]

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. 1063—CRIM.

THE UNITED STATES OF AMERICA,
Plaintiffs,

vs.

ALEX GLADSTONE, Indicted as WILLIAM
VINES, and MORRIS FRIENDLANDER,
Indicted as H. FRANKLIN,
Defendants.

Verdict.

We, the jury duly impanelled in the above-entitled case, find the defendant, Alex Gladstone, indicted as William Vines, guilty as charged in the indictment, and the defendant, Morris Friedlander, indicted as H. Franklin, guilty as charged in the indictment.

San Diego, Sept. 13, 1916.

J. P. HADDOCK,
Foreman.

The jury recommends, however, Morris Friedlander to the mercy of the Court.

J. P. HADDOCK,
Foreman.

[Endorsed]: 1063—Crim. U. S. Dist. Court., So. Dist. Cal., So. Div. U. S. vs. Vines & Franklin. Verdict. Filed Sept. 13, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [45]

*In the District Court of the United States, for the
Southern District of California, Southern Di-
vision, Ninth Circuit.*

No. 1063-CRIM.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM VINES and H. FRANKLIN,

Defendants.

Motion for New Trial.

Come now the defendants William Vines and H. Franklin, and move this Honorable Court that they be granted a new trial, and for grounds of this motion allege:

A. That the Court misdirected the jury in questions of law.

B. That the Court erred in decisions of questions of law arising during the course of the trial.

C. That the verdict is contrary to the law.

D. That the verdict is contrary to the evidence.

E. That the verdict is contrary to the law and the evidence.

F. That the evidence is insufficient to justify the verdict.

G. That the Court erred in refusing each and every instruction requested by the defendants and refused by the Court.

H. That the Court erred in giving each and every instruction requested by the prosecution and given by the Court.

I. That the Court erred in modifying each and every instruction requested by the defendants and modified by the Court and thereafter given as modified by the Court.

A. J. MORGANSTERN,
PAUL W. SCHENCK,
Attorneys for Defendants.

[Endorsed]: No. 1063-Crim. In the United States District Court, for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. William Vines and H. Franklin, Defendant. Motion for New Trial. Received copy of the within motion this 2 day of Oct. 1916. C. R. Moody, Asst. U. S. Atty., Attorney for ———. Filed Oct. 2, 1916. [46] Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Paul W. Schenck, 619-26 Homer Laughlin Bldg., Los Angeles, Cal., F2151, Main 1005, Attorney for Defendants. [47]

At a stated term, to wit, the July Term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Monday, the second day of October, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable OSCAR A. TRIPPET, District Judge.

No. 1063—CRIM.—S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

ALEXANDER GLADSTONE, Indicted as WM.

VINES, and MORRIS FRIEDLANDER,

Indicted as H. FRANKLIN,

Defendants.

Sentence.

This cause coming on this day for the sentence of defendants; Robert O'Connor, Esq., and Clyde R. Moody, Esq., Assistant U. S. Attorneys, appearing as counsel for the United States; defendants being present on bail, with their counsel, Paul Schenck, Esq., and A. J. Morganstern, Esq.; Wm. C. Wren being present as shorthand reporter of the proceedings, and acting as such; and A. J. Morganstern, Esq., of counsel for defendants having moved the Court for a continuance of this cause for said sentence until return can be had from the authorities of this Government at Washington, D. C., on an application for an executive stay of proceedings in this cause, which motion is resisted by counsel for the Government; and said motion having been argued, in opposition thereto, by Clyde R. Moody, Esq., Assistant U. S. Attorney, of counsel for the United States, and in support thereof by A. J. Morganstern, Esq., of counsel for defendants; it is by the Court ordered that said motion of defendants for a continuance of this cause for the sentence of said defend-

ants be, and the same hereby is denied, to which ruling of the Court, on motion of defendants and by direction of the Court, exceptions are hereby entered herein on behalf of said defendants; and a motion for a new trial having been filed herein on behalf of defendants, and having been argued, in support of said motion by A. J. Morganstern, Esq., [48] of counsel for defendants; it is by the Court ordered that defendants' said motion for a new trial be, and the same hereby is denied, to which ruling of the Court, on motion of defendants and by direction of the Court, exceptions are hereby noted herein on behalf of said defendants; and defendants having been called for sentence; and statements concerning sentence having been made by Clyde R. Moody, Esq., Assistant U. S. Attorney, of counsel for the United States; the Court thereupon pronounces sentence upon said defendants for the offenses of which they now stand convicted, namely, the offenses of violations of Section 2 of the Act of Congress of January 17, 1914, having in possession, receiving, etc., smuggled smoking opium, as follows, to wit: The Judgment of the Court is, that the defendant Alexander Gladstone, indicted as William Vines, be imprisoned in the United States Penitentiary at McNeil Island, State of Washington, for the term of eighteen (18) months, and that the defendant Morris Friedlander, indicted as H. Franklin, be imprisoned in the County Jail of Los Angeles County, California, for the term of six (6) months; and the defendants, on motion of Robert O'Connor, Esq., Assistant U. S. Attorney, having been committed to the custody of the U. S.

Marshal; it is, on motion of said Robert O'Connor, Esq., Assistant U. S. Attorney, of counsel for the United States, ordered that this cause be, and the same hereby is continued until the hour of 2 o'clock P. M., of this day for hearing on a motion as to the amount to be fixed for bond for appearance of defendants pending appeal. [49]

In the District Court of the United States, in and for the Southern District of California.

No. 1063-CRIM.—S. D.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM VINES and H. FRANKLIN,

Defendants.

Certificate of Clerk to Judgment-roll.

I, Wm. M. Van Dyke, clerk of the District Court of the United States for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of an original Judgment entered in the above-entitled action; and I do further certify that the papers hereto annexed constitute the Judgment-roll in said action.

ARREST my hand and the seal of said District Court, this 7th day of October, A. D. 1916.

[Seal]

WM. M. VAN DYKE,

Clerk.

By Leslie S. Colyer,

Deputy Clerk.

[Endorsed]: No. 1063—Crim. In the District Court of the United States for the Southern District of California, Southern Division. The United States of America vs. William Vines et al. Judgment-roll. Filed Oct. 7, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Recorded Min. Bk. Book No. 25, page ——. [50]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 1063—CRIMINAL.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

WILLIAM VINES and H. FRANKLIN,

Defendants.

Defendants' Proposed Bill of Exceptions.

Be it remembered that heretofore the Grand Jury of the United States, in and for the Southern District of California, did file and return unto the above-entitled court its indictment against the defendants William Vines and H. Franklin, and thereafter the said William Vines and H. Franklin appeared in said court, and having duly pleaded, as shown by the record herein, and the cause being at issue, the same came on for trial before the Honorable Oscar Trip-
pet, District Judge, and a jury duly impanelled, the United States being represented by Robert O'Connor, Esq., and Clyde R. Moody, Esq., Assistant United States Attorneys, and the defendants, Will-

iam Vines and H. Franklin, being represented by Alfred Morganstern, Esq., and Paul W. Schenck, Esq., the following proceedings were had.

Mr. MORGANSTERN.—We desire to file at this time, your Honor, the following motion for continuance.

Motion for Continuance.

Come now the defendants in the above-entitled action by A. J. Morganstern, Esq., their attorney, and move a continuance of the trial in the above-entitled matter, and for ground of such proposed continuance specify:

That heretofore a stipulation was had by and between John B. Elliott, Collector of Customs for the Port of Los Angeles, [51] and A. J. Morganstern, Esq., attorney for the above-named defendant. The nature of which and the full purpose of which are set out in the affidavits of A. Gladstone and Morris Friedlander, on file herein, hereby referred to and by such reference made a part hereof as fully as though the same had been specifically herein impleaded. It is now apparent to the defendants and to their counsel that there is no intention upon the part of the Government to keep the said stipulation and the purpose of the proposed continuance is to enable the above-named defendants to apply to the President of the United States for executive action in the matter, in the manner by law provided.

This motion will be based upon the affidavits of A. Gladstone, Morris Friedlander and C. E. Burch, filed herein, and upon the records and files in the above-entitled court in the above-entitled cause.

Dated at San Diego, California, September 12,
1916.

A. J. MORGANSTERN,
Attorneys for Defendants. [52]

Affidavit of A. Gladstone.

United States of America,
State of California,
County of San Diego,—ss.

A. Gladstone, being first duly sworn on his oath
deposes and says:

I am one of the defendants named in the foregoing
proceeding and was with my codefendant arrested in
the county of San Diego, State of California, and
lodged in the county jail in said county; that while
so incarcerated I retained A. J. Morganstern, Esq.,
as and for my attorney in the above-entitled pro-
ceeding; that I was advised by the said A. J. Morgan-
stern that he had had a conference with Hon. John
B. Elliott, Collector of Customs for the Port of Los
Angeles, and that the said Elliott had agreed with
him, said Morganstern, that if I would truthfully
disclose where the opium was obtained which I was
charged with transporting and where it was to be
delivered, that recommendation would be made to the
office of the District Attorney that the case against
Friedlander, otherwise known as Franklin, would
be dismissed, or that a *nolle prosequi* would be en-
tered therein as to him, and that upon my plea of
“guilty” a nominal fine would be suggested to the
Court as satisfactory to the Government; I there-
upon agreed to make full and complete disclosure as
I could, and within a day or two thereafter was taken

to the office of Mr. Elliott in the Federal Building, in San Diego, and there in the presence of the U. S. Commissioner Burch, John B. Elliott and my attorney, Mr. Morganstern, the same stipulation which Mr. Morganstern had repeated to me was again entered into between Mr. Morganstern and Mr. Elliott in the presence of Commissioner Burch and myself, and I was assured by Mr. Elliott that nothing which I might say would be used against me, or for any other purpose than for the purpose of carrying out the said agreement and stipulation; I thereupon told Mr. Elliott all I knew of the transaction from beginning to end fully, fairly and truthfully. I am now informed by my said attorney, and upon [53] information and belief allege the fact to be, that there is no intention upon the part of the Government represented by its said Collector of Customs, to carry out the promise made to me. Upon a later occasion upon an application addressed to the above-entitled court, Judge Cushman presiding, wherein it was sought to have the bail of Mr. Friedlander, my codefendant, reduced from \$5,000 to \$2,000, the Assistant District Attorney present started to read from a transcription of my statement to Mr. Elliott and sought to use the same in contesting the application for reduction of bail, and did read a portion thereof until stopped by the Court, upon objection from Mr. Morganstern, from further using the same.

A. GLADSTONE.

Subscribed and sworn to before me this 12th day of September, 1916.

WM. M. VAN DYKE,
Clerk U. S. District Court, Southern District of
California.

By Lester S. Colyer,
Deputy. [54]

Affidavit of Morris Friedlander.

United States of America,
State of California,
County of Los Angeles,—ss.

Morris Friedlander, being first duly sworn, upon his oath deposes and says:

I am one of the defendants named in the foregoing proceeding, sometimes called therein Franklin; while in company with Mr. Gladstone, my codefendant, I was arrested and incarcerated in the County Jail at San Diego, and shortly thereafter retained A. J. Morganstern, Esq., as my attorney to represent me; I was taken thereafter to the office of Mr. John B. Elliott, Collector of Customs, in the Federal Building, at San Diego, and there in the presence of Mr. Elliott, Mr. A. J. Morganstern and U. S. Commissioner C. E. Burch, was told by Mr. Morganstern that the purpose of my being called there was as follows:

That Mr. Gladstone had assured Mr. Elliott, the Commissioner, and Mr. Morganstern, that I had no knowledge whatever of the purpose of the trip Gladstone and I had taken, and was entirely unaware of the fact that opium was being transported, and that I played no part therein, and that it was stipulated

between Mr. Morganstern and Mr. Elliott that if both Gladstone and I should tell all we knew and should fully and fairly disclose the truth, that the case against me would be dismissed and that the Government would suggest a fine in the Gladstone case. Thereupon, in the presence of the persons stated, I fairly, fully and truthfully stated all that I knew about the trip to Mr. Elliott, expecting that as a result thereof the promise made on behalf of the Government by the said John B. Elliott *would kept*; that I am entirely innocent of any wrongful act charged against me in connection with the above-entitled matter.

MORRIS FRIEDLANDER. [55]

Subscribed and sworn to before me this 12th day of September, 1916,

WM. M. VAN DYKE,
Clerk U. S. District Court, Southern District of
California.

By Lester S. Colyer,
Deputy.

The COURT.—Is the stipulation between you entered in writing?

Mr. MORGANSTERN.—No, your Honor; but if the Court wants further proof than that already submitted by way of affidavits we can make a further showing.

The COURT.—Did you apply last time to have the case dismissed and a *nolle pros.* entered?

Mr. MORGANSTERN.—No, your Honor. The matter was still in course of negotiation. Your Honor may remember that at the time the plea was

entered in this case I then stated to the Court that, with respect to the defendant Gladstone, we reserved the right to withdraw that plea at a future time and to plead guilty. At that time negotiations were in progress.

Mr. O'CONNOR.—Not with the District Attorney's office.

Mr. MORGANSTERN.—No; I am not making the slightest insinuation that the District Attorney was a party to the transaction.

Mr. O'CONNOR.—You knew at that time that the case was in the hands of the District Attorney's office, and from that time on, and there has been no negotiation with the District Attorney's office since the indictment.

Mr. MORGANSTERN.—Well, that is not quite right. At one conference between Mr. Elliott and myself Mr. Schoonover was present, and that was after the indictment, and Mr. Schoonover knew the statements that were being taken. I will make further showing on that subject, if necessary. Now we are ready to go to [56] trial in the Franklin case; but the defendant Gladstone has made a full and fair disclosure of the things he promised to disclose. That disclosure was made in the presence of his counsel. I think your Honor can readily understand the embarrassment in which counsel will find themselves in attempting to go to trial in a case of that character, and if we plead guilty, which is the only ready course open to us with propriety, we cannot avail ourselves of the proposition of executive clemency without the defendant suffering some punishment. The United States Commissioner, Mr. Burch, was

present at these conferences and conversations, and he is in the courtroom.

Mr. O'CONNOR.—I would like to have Mr. Burch called so far as the Government is concerned. We were only served with this motion this morning and have had no time to prepare an affidavit, of course.

The COURT.—Why didn't you make this application sooner, Mr. Morganstern?

Mr. MORGANSTERN.—There are two reasons, your Honor. The first I have already stated to the Court; the second is that the defendant Gladstone was not in San Diego nor where I could easily reach him for the purpose of obtaining a showing. He arrived in San Diego either last night or this morning.

Mr. O'CONNOR.—I think the testimony of Mr. Burch would show that there was no such offer made by Mr. Elliott as is contended for by counsel for defendant; and in the second place, the defendant has had six months in which to make his application to the President if such an application could be made and he has failed to do so. However, in the case of *United States vs. Lamar*, the Supreme Court held that the President was without power to grant a pardon prior to conviction, and likewise without power to suggest or direct the Attorney General to dismiss a case. He could advise him that he thought it might be dismissed, but had no power to direct him to dismiss it; that it is only after conviction [57] that an application to the President can be made for pardon.

The COURT.—Have you examined that case, Mr. Morganstern?

Mr. MORGANSTERN.—I have not, your Honor.

Mr. O'CONNOR.—I haven't the citation here, but I can easily find it. Of course, after conviction of plea of guilty, then the application could be made to the President.

The COURT.—Call the officer and let us hear what he says about it.

Testimony of Charles E. Burch, for Plaintiff.

CHARLES E. BURCH, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

My name is Charles E. Burch; I am United States Commissioner at San Diego; I know Mr. Morganstern, Mr. Gladstone, Mr. Friedlander, and Mr. Elliott, Collector of Customs of Los Angeles; as I recall the conversation that took place prior to the statements, with reference particularly to any promise of immunity—or the interrogatories, rather—that were propounded by Mr. Morganstern to Mr. Friedlander and Mr. Gladstone, it was to the effect that the two defendants wanted to make a statement with reference to their connection with this opium traffic, they having prior to that time been bound over by me, having been charged with having in their possession 75 cans of opium; as I recall the statement as made by Mr. Elliott to Mr. Morganstern, who was the attorney representing the two defendants, it was of a nature which would not justify the inference of an immunity; in other words, Mr. Elliott said, “Now, if these men have anything to say I will hear what they have to say”; that, in my

(Testimony of Charles E. Burch.)

mind, was about the sum and substance of the statements made by Mr. Elliott in the Collector of Custom's office; I can't recall in detail the conversation that took place, but there were no interrogatories, as I recall, propounded by Mr. Elliott to either of the two defendants; the [58] interrogatories were propounded by Mr. Morganstern.

Cross-examination by Mr. MORGANSTERN.

I happened to be called into that conference because I was in the United States Marshall's office when you entered the room and stated that you were going to have some sort of conference with Mr. Elliott and rather indicated the desire that I should be present rather than the marshal; I don't think you said you came at Mr. Elliott's request; when I reached the room where Mr. Elliott was and the defendant Gladstone, I did not hear any conversation between Mr. Elliott and Mr. Morganstern; there was no promise made by Mr. Elliott concerning a *nolle pros.* or anything of that kind; there was no promise made by Mr. Elliott of any immunity to this defendant Gladstone in the event he would tell truthfully where the opium was obtained and where delivered, because in the course of the interrogatories propounded by you, after an hour's time, the defendant seemed to desire to evade, or at least not to answer some question and Mr. Elliott said, "Now, if you are going to come in here and make any statements, we don't want to take up time by going away around about it. If you want to say anything, say it"; I don't recall Mr. Elliott asking any questions at all.

Testimony of Alfred Morganstern, for Defendants.

ALFRED MORGANSTERN, counsel for defendants herein, having been first duly sworn, testified as follows:

Shortly after the arrest of these defendants I had a conference with Mr. Evans, Deputy Collector in charge at Tia Juana, who made the arrest; I suggested to him the advisability of having these defendants fully disclose the truth because they might glean from them where this opium was coming from and where going; Mr. Evans agreed that it would be a wise matter to take it up with Mr. Elliott rather than himself; we waited for some days for Mr. Elliott to come; he was expected down for the opening of the race track and the arrangement of new conditions there; he [59] finally did come and we had a conference; Mr. Elliott said this was a large amount of opium and that he was anxious to know where it was going; I said, "Mr. Elliott, so far as Friedlander is concerned, I am satisfied of his innocence in the matter. So far as Gladstone is concerned, I have talked with him, and he is perfectly willing, in event we can make an agreement that the Government will respect, to tell you the entire truth." "Well," he says, "what sort of an agreement is that?" I says, "We want a *nolle pros.* in the Friedlander case, because I think from looking over the testimony on the preliminary examination before the master you will probably be able to satisfy yourself that he should not be bound over. So far as Gladstone is concerned, he is guilty, and if a nominal fine of some

(Testimony of Alfred Morganstern.)

sort could be recommended to the Court we would be satisfied with the arrangement." He wanted to know what I meant by a nominal fine; we discussed something about a thousand dollars; I thought that sort of fine could probably be paid; then we went up to Los Angeles again and came back the following day, or the second day; I met him in his office by appointment, in this building; Mr. Carse, the deputy marshal, brought the two defendants to the marshal's office; Mr. Elliott said, "I would rather you would go down and see Carse and have those men brought up here. He doesn't seem to want to bring them to my office." I says, "What is the matter—some friction between you and Carse?" and he said, "Something of that sort." When I went there Mr. Burch, the Commissioner, was also in the office; I called Mr. Burch out and asked him whether he would take charge of the defendants to come up to Elliott's office; when Mr. Gladstone, Mr. Burch and myself were seated in Mr. Elliott's office I repeated to Mr. Gladstone the conversation which I had theretofore had in his absence with Mr. Elliott and Mr. Elliott turned about and said, "That is correct"; he says, "We understand each other. And this deposition of yours or any statement you care to make in the matter along these lines will not be used against you for any other purpose or in any other fashion. What I want to know is where this stuff was coming from [60] and where it was going. If you can tell me that, you will render us a great service." Then Gladstone, largely at the interrogation of Mr. Elliott,

(Testimony of Alfred Morganstern.)

rather than myself, told the story; as he progressed Mr. Elliott would digress and take him off at an angle and go into details by way of interrogatories; Mr. Elliott at the time was making lead pencil notes of the conversation; wherever the statement was not as complete as I thought it should be I asked additional questions to seek to elicit the entire truth; later in the day Friedlander was brought up and the same situation gone into; much of the time of the Friedlander investigation was taken up in trying to determine how long Mr. Friedlander had known Gladstone, and how he happened to meet him and how he happened to come down here at this time; Friedlander at that time having been a sick man, and having been down, apparently, on the trip with Gladstone with no knowledge on his part as to where he was going or why; some few days later that I met Mr. Elliott in Los Angeles in his office; I had Mr. John J. Sullivan, of Seattle, former Deputy United States Attorney; at that time Mr. Schoonover was called into Mr. Elliott's office; Mr. Schoonover said, "We cannot *nolle pros.* this case, Mr. Morganstern, we cannot convict anybody else on this testimony." I said, "That was not agreed, Mr. Schoonover, with Mr. Elliott, nor was it ever discussed; no promise was ever made by me or by the defendants that they would give you evidence which would convict somebody else; I agreed with Mr. Elliott to have these defendants tell him whatever they knew about their trip, to have Gladstone tell him where the opium was obtained, how it was obtained, and whence it was to be

(Testimony of Alfred Morganstern.)

delivered, all of which Gladstone did, I thought at the time, fully and fairly." I had another interview with Mr. Elliott some time later in which he said that "that information didn't give us what we wanted"; I told him, "Mr. Elliott, I wish you would take this up with the District Attorney and look into the promise you have made and have him determine for you whether or not it ought to be kept, and let me know later what you think [61] about it"; that is the last I heard about it; I should think that was some four or five months ago, since the case was last called here; now, that is the situation as fully as I remember it; Mr. Elliott took notes about it; the next I knew of it is what occurs in the other affidavit, when motion was made to Judge Cushman to reduce the bail of Friedlander, which was reduced by Judge Cushman from \$5,000 to \$2,000, with a certain statement as to his whereabouts in the *intermin*, and one of the District Attorneys sought to use that statement that was made by Mr. Elliott and the Court stopped that proceeding; that is the entire conversation as I can remember it, then, and is as fully as I can possibly repeat it; there was never a moment's thought in my mind but what the agreement would be faithfully kept, if made in good faith; it was made after consultation with Mr. Evans, the man who arrested them, and who procured Mr. Elliott's attendance here for that very purpose.

Cross-examination by Mr. O'CONNOR.

Mr. Evans said it was a matter that would have to be taken up with Mr. Elliott; that he couldn't en-

(Testimony of Alfred Morganstern.)

gage in that agreement himself; Mr. Evans at the time of the request, came to my house, on Christmas day I think it was, to first discuss the matter; I first phoned him and asked him when he came over town to drop in and see me, which he did; at the time I asked Mr. Elliott these questions relative to what would be done if this statement was made I knew that Mr. Elliott was only a collector of customs and in no wise connected with the United States Attorney's office, but I also knew that the recommendation of the customs department in these matters has, as far as my observation goes, been usually respected; I wouldn't quite say that, as a matter of law, the Collector of Customs had nothing to do with prosecuting the case, but I knew that he was not a prosecuting officer; the promise was not that he would recommend it to the court, but that he would [62] recommend it to the prosecuting officer; I think the affidavit so states; I knew he did not have the power, himself, to do those things, but that he must apply to another party; I thought then, and I think now, that there is an equitable manner of enforcing that sort of an agreement when made by any public official who had in charge any part of the prosecution or investigation of a case; I knew that Mr. Elliott had nothing to do with the case other than the gathering of information; these negotiations started before the preliminary examination before the magistrate; after they were started, and after the conversations were had that I have related, I then suggested to Mr. Elliott that Mr. Schoonover be called into the matter

(Testimony of Alfred Morganstern.)

and consulted; when Mr. Schoonover came in he said he didn't think an agreement of that kind would be binding upon the Government unless it enabled them to convict somebody; he says, "I have gone over this statement of Mr. Elliott's and the statement made to Mr. Elliott, and I don't think it gives the information we are looking for," that was some time after they were bound over; this statement was made after they were bound over; prior to the taking of this statement I did not communicate directly with the United States Attorney's office and endeavor to have one of their assistants or Mr. Schoonover present and obtain an agreement directly from him as to what should be done, excepting in this fashion; that I told Mr. Elliott that these defendants were ready to make any statement they made to him either in court or to the United States District Attorney; I thought then, and still think, that the equitable right of the defendant does not depend upon the *peculiar* officer to whom he made his statement.

Q. (By Mr. SCHENCK.) I understood you to say that Mr. Elliott, after receiving this proposition, went up to Los Angeles and came back in a couple of days.

A. Yes, I think there were a couple of days intervening between the time of the agreement and the time of the actual making of the statement; my recollection is this—I may be in error about it however—that after the proposition was made and discussed [63] and accepted, then Mr. Elliott fixed the time when he would be here again to hear these

(Testimony of Alfred Morganstern.)

statements; that is my present recollection; I think that is correct too.

The COURT.—The motion for continuance will be denied.

Mr. MORGANSTERN.—Exception.

Testimony of Thomas L. Rynning, for Plaintiff.

THOMAS L. RYNNING, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows.

Direct Examination by Mr. O'CONNOR.

My name is Thomas L. Rynning; I am under-sheriff of this county; I have been under-sheriff a little over a year and a half; I know the defendants; I saw them the first time on the 23d of December last, 1915, in Spring Valley; at the time I saw them Mr. Fullerton, and another man that drove the automobile, Mr. Landis, and myself were present; the man I speak of is named George; it was about 11 o'clock in the morning; an automobile drove up to the water trough and stopped; we were there to intercept it; it was a 1914 Studebaker; we received a telegram from the sheriff at El Centro; I went up to the automobile, took from the automobile two cases, a suitcase and a black box, and placed two men under arrest that were in that car at that time, and brought them into the county jail and opened the boxes; these are two men I placed under arrest at that time.

Q. (By Mr. O'CONNOR.) What conversation did you have in the presence of these defendants when you first went up to the automobile?

(Testimony of Thomas L. Rynning.)

Mr. MORGANSTERN.—We object to any conversation either by or in the presence of the defendants which seeks to elicit any possible statement by the defendants or actions of the defendants, upon the ground that it is incompetent, irrelevant and immaterial until the *corpus delicti* shall first have been established.

The COURT.—State what was said. [64]

Mr. MORGANSTERN.—Exception.

A. I asked him who owned these two valises, the dress-suit case and the box, and they said, “I do”; both of them spoke at the same time, both Vines and Franklin.

Q. (By Mr. O’CONNOR.) State what was said and done next.

Mr. MORGANSTERN.—Same objection.

A. So I took one of them out, and Mr. Landis took the other; I asked for the keys; they said, “We know nothing about the keys at all. They are not ours”; that was immediately after they said “I do”; after I placed them on the ground.

Q. (Mr. O’CONNOR.) What else was said?

Mr. MORGANSTERN.—Same objection; and I understand our objection applies to all this class of testimony at this time, your Honor, and same exception reserved.

The COURT.—All right.

A. I said “You are both under arrest”; I placed Mr. Vines in an automobile with Mr.—Franklin was in the automobile with us and Mr. Vines got in with Mr. Landis; we drove in to the county jail; before

(Testimony of Thomas L. Rynning.)

we got to the county jail we met Mr. Evans; he proceeded down to the county jail with us and in their presence we opened the two receptacles—or the two boxes; “T. H. R. 12/23/15,” that is the mark I placed on the box at that time (referring to black box) you will find them on each of the boxes, and also on the separate one.

Mr. MORGANSTERN.—We will stipulate that the present contents of these grips here are the contents the officers found in the grips when they opened them; I don't think there is any necessity to prove that matter.

A. I had no conversation whatever with the defendants and no conversation occurred in my presence and in the presence of the defendants with reference to the suit cases at the county jail; no conversation occurred at the county jail, any more than that we brought them in there and booked them, and we turned them over to Mr. Evans, he being the Government man; we had no conversation any more than with any man that was arrested; they wanted to see the warrant and so forth; Vines made the remark at one time—whether it was in the county jail or right there at the place—he said, “My friend had nothing to do with this at all.” I don't recall whether he said that at the jail or at Spring Valley; the gentlemen at the table on this side is Vines; Mr. Vines made the remark [65] that his friend had nothing to do with it; at the jail they gave the names of Vines and Franklin; Vines and Franklin is what they were booked under; at the time I came up to

(Testimony of Thomas L. Rynning.)

the automobile and had conversation with them, nothing was said to me by either one of the defendants as to their relationship; in my presence at one time or another they said they were brothers; I don't know whether they said it or not, but during some conversation I was led to believe that they were brothers; I don't remember who said it; I had no conversation, *with* the presence of these defendants, with either George or Fullerton; nothing was said in the presence of the defendants by either George or Fullerton as to where the grips came from; they told me, but not in the presence of the defendants.

Cross-examination by Mr. MORGANSTERN.

When I stopped the car, or when I came up to the car there were four men in the car; at the time I approached the car one was out; just stepped out of the car; it was the man named George who had stepped out; at that time these grips were behind the front seat—or immediately in front of the rear seat; they were in the tonneau of the automobile; Mr. Vines was seated in the tonneau and Mr. Fullerton; Franklin, or Friedlander, was sitting in the front seat with the driver; neither of these grips were in the front seat; when I first approached the car I addressed myself to George, the driver; I said, "Where are the grips?" He said, "In the rear"; next I addressed myself to Vines and Franklin and Mr. Fullerton, all three in the car; I said, "Who owns these?" I was looking into the car; looking at Vines; Vines replied, "I do"; Fullerton never opened his mouth; Franklin, or Friedlander said

(Testimony of Thomas L. Rynning.)

"I do"; they both said, "I do" about together; I certainly saw Friedlander's lips move at that time; he turned around and faced me; I stepped up to the left side of the automobile; Vines was seated on the opposite side and Friedlander on the right hand side on the left hand drive of the car; Friedlander was turned around *with* I walked up to the car before I spoke; it is not a fact that I ordered [66] everybody out of the car before I spoke; immediately afterwards I asked for the key; they both said that they had no key, that it was not theirs, or something of that sort; I did not break them open then; I sent them both down and they were broken at the county jail; after they said they had no key I took the keys out of Vines pocket and tried every key he had and they didn't fit these grips; I took the keys out of Friedlander's pocket at the county jail; I am not sure that either one of them had keys; one of them had keys but I don't know which one; it might have been both; I have stated that I might have only got one set of keys; we searched them for guns, as I search anybody when I arrest them; I didn't find any arms on then; I searched Mr. Fullerton, and asked him a great many questions about these things; he was placed under arrest until we was brought into San Diego, and Mr. Evans came right along and says, "We don't want this man at all," he told me all he wanted was these two men; that is all I know about it; the man whose name is George was driving the car; we did not search him for keys or arms; I asked him a great many questions; I asked him if he

(Testimony of Thomas L. Rynning.)

knew anything about this opium; I did not place him under arrest not even out there on the road; the grips that were in the automobile were covered, as near as I can recollect, with a robe; there was a robe or coat or something hanging on the rod; not particularly covered; a person riding in that car would have known there was something there under the robes; I said partially covered, I think.

Testimony of William Landis, for Plaintiff.

WILLIAM LANDIS, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows.

Direct Examination by Mr. O'CONNOR.

My name is William Landis; I am deputy sheriff, San Diego County; I have been deputy sheriff six years; I know the defendants Vines and Franklin; I saw them first on the morning of the [67] 23d of December, 1915, in Spring Valley; the under-sheriff, Rynning, was with me; the automobile came down the hill and stopped at the watering-trough; we walked up to the machine; the under-sheriff approached the machine on the north side and I walked around on the south side; I addressed my remarks mostly to Franklin; we asked them where they were going; they said they were going to San Diego; I says, "Have you got any baggage"? They says, "Yes"; then the under-sheriff asked him who those suitcases belonged to; I asked Franklin; Franklin said, "They belong to us"; then the under-sheriff took the suitcase and lifted it out on the north side of the machine; I lifted the other case out on the south

(Testimony of William Landis.)

side of the machine and was on the south side of the machine; I asked him where the keys were. He says, "I haven't any keys." I said, "Where is the keys so that we can open them?" He says, "I don't know; they don't belong to us." Vines said that; then the under-sheriff says, "Well, we will bust them open," and Vines says, "Well, I don't care, they are not ours." "Well," he said, "you just stated they belonged to you, several times." "Well, they are not ours," he says. Franklin was sitting in the front seat of the machine at that time; he hadn't gotten out yet; the first words I remember Vines saying was when we asked him for the keys; I don't remember what Vines told Rynning for I had charge of Franklin mostly; I was asking my questions of Franklin; there were no other grips, packages or baggage of any kind in the car; I think there was a robe, I wouldn't say positively there might have been an inner-tube lying in the back, I didn't notice; I had some conversation with Vines on the way to town; he wanted to know what business we had coming out there and stopping them; I told him we had a telegram to come out there and intercept a certain car and we were merely obeying orders; he said, "Are you not a deputy sheriff?" and I says, "I am." "Well," he says, "how comes it that the sheriff's office sticks into this kind of business?" I says, "I don't know; you will have to ask the sheriff in regard to that, because I am just obeying orders on that."

[68]

Q. (By Mr. O'CONNOR.) Well, with reference

(Testimony of William Landis.)

to the suitcases or their contents, or anything in connection with this case, was there any other conversation?

Mr. MORGANSTERN.—We desire to object to the testimony of this witness on the same lines as the objection heretofore interposed to the testimony of the witness Rynning as to any extra-judicial statements as to the defendants or either of them on the ground that the *corpus delicti* has not been established.

The COURT.—The objection is overruled.

Mr. MORGANSTERN.—Exception.

WITNESS.—Two suitcases were both placed in the machine I was driving; Mr. Vines was in the machine with me, in the front seat at the side of me; on the way in I asked him what was in the suitcases; he said he didn't know; I asked him different questions on the way in; I believe one question I asked him, I asked him what part of Frisco he was from; he looked at me and said, "Who said I was from Frisco?" I said, "Nobody, but I just asked you what part you were from." And then he said, "Who told you I was in Frisco?" I says, "No one told me." "Well," he says, "what made you ask that kind of a question?" I said, "I was just asking for information, just the same as anyone else would"; then he asked me where I was from and I told him where I was from; Vines said he made a trip to the valley with his brother; his brother was sick; he took his brother along for the trip; I had no other conversation in regard to his brother being

(Testimony of William Landis.)

sick; I didn't ask him what he went to the valley for; after we got to the jail the boys booked them; they booked one as Vines and the other as Franklin; Mr. Vines said, "The kid hasn't got anything to do with this." He says, "If anyone is to blame I will take all the blame." He said, "The kid is perfectly innocent of it." [69]

Cross-examination by Mr. MORGANSTERN.

When I first saw this automobile there were four men in it; the driver, George, and Mr. Franklin, were in the front seat, and Mr. Fullerton and Mr. Vines were in the rear; Vines was right back of Friedlander; Captain Rynning and I reached the car about the same time; George was the first one that spoke. He said, "We have got a flat tire." The under-sheriff says, "Well, where are you going?" He says, "We are going to San Diego"; then the under-sheriff asked Vines where they were going; he said they were going to San Diego too; Captain Rynning asked Vines whose baggage that was; I don't remember what Vines told him, for I asked Franklin about the same time; Franklin says, "It is our baggage." I didn't hear Vines answer at all; Friedlander was looking toward me for I was addressing him; he might have looked toward Vines when the under-sheriff was talking to Vines; he turned to the left, toward the seat at his side; I remember testifying as a witness upon the preliminary hearing in this case; I don't remember testifying upon that occasion, "No. He was pretty sick. He didn't say anything," because he didn't look sick to

(Testimony of William Landis.)

me; he was wrapped up; he didn't say much; he didn't say as much as Vines did; all I heard him say was in regard to the baggage, "It is ours"; after our conversation we put the baggage on the watering-trough; I asked Vines for the keys; he said he didn't have them; Rynning had some keys there; he tried to open the grips; I don't know where he got them; I heard Rynning ask George who the baggage belonged to; George said, "I suppose it belongs here to these fellows," probably from three to five minutes elapsed between the first question as to whose baggage it was and their statement that it wasn't their baggage; then they were asked for keys; I didn't search Franklin for guns; the under-sheriff told me to go get my machine and I went and got it and don't know what happened in the meantime; they told us they had no keys for those things; Captain [70] Rynning tried to open the grips with some keys; I don't know where he got them.

Redirect Examination by Mr. O'CONNOR.

I think the under-sheriff said we were officers from the sheriff's office before Franklin stated in answer to the question as to who owned the grips, that "they belong to us"; that was after Vines asked him what right we had to hold them up there.

Mr. MORGANSTERN.—So far as the defendants are concerned, it may be stipulated that the contents of these cans in these grips is opium prepared for smoking; we will also stipulate that the suitcases and opium may be referred to in argument without the necessity of introducing them in evidence.

Testimony of Horace U. Kennedy, for Plaintiff.

HORACE U. KENNEDY, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. O'CONNOR.

My name is Horace U. Kennedy; I am chief clerk of the Hotel Cecil; I have been such clerk about two years; that hotel is on Sixth street between B and C in San Diego; I have seen the defendants before; I think I saw them about the first of the year at the hotel; they stopped at the Cecil; that book, U. S. Exhibit No. 1 for Identification, is a hotel register of the Cecil Hotel; it shows the names of the persons who registered at that hotel on December 21; the name Vines is here; the initials are W. & H.; when they registered at the hotel is when I saw these two defendants; one registered and the other made the remark, "I will register," and he says, "I have registered for you"; they were assigned to the same room; afterwards there were two suitcases came in; those were the cases; they stayed at the hotel just that night; I should judge when they came in it was along in the [71] evening—seven o'clock; they came by stage; I am called at half past six and on at seven, and they had left then.

Cross-examination by Mr. MORGANSTERN.

The two gentlemen back of you are the two defendants; I think that gentleman right there (pointing to Franklin) did the registering; I wouldn't swear to it; I had never seen these two men before; I see by the register that this occurred about Decem-

(Testimony of Horace U. Kennedy.)

ber 24, 1915; I was mindful of the fact that this is the man that did the registering because I glanced up at the man when the other man made a request that he register and he made the remark that he had registered for him; I have no remembrance what date it was except that page there; those two grips are identified in my mind as the two grips carried by the men who came and registered that evening because they were left in the office all night with me; I only glanced at them; I saw them in the stage office next door; they were brought into the hotel afterwards while I was there; I identify them as the same grips because there are few grips left there at any time and the night clerk spoke to me; he said, "Now, there is two suitcases"; I was there when the suitcases came in; these gentlemen brought them in; I didn't say they were brought in from the stage office later; I said I saw them in the stage office; I couldn't say which gentlemen carried them; I never had seen these men before; I will not be positive which one registered; I may be mistaken about this man having done the writing; there was nothing about their conduct that particularly caused me to note them that evening; they were both at the counter together; one of them asked for a room; I could not recognize the man who registered by his voice; I saw them the next morning; I saw them again in the preliminary examination in this case; I did not testify before in the matter; the grips were brought in from the stage office and I couldn't say they were carried into the hotel by either of these men; I didn't see these two men bring them in. [72]

(Testimony of Horace U. Kennedy.)

Mr. O'CONNOR.—I desire to offer the register in evidence.

Mr. MORGANSTERN.—We object to it as wholly incompetent, irrelevant and immaterial.

The COURT.—The objection is overruled.

Mr. MORGANSTERN.—Exception.

Redirect Examination by Mr. O'CONNOR.

These men registered at the hotel on the date that appears at the top of that page, December 21.

Mr. MORGANSTERN.—The register may be stipulated as having been read and it can be read in argument if desired.

Testimony of D. J. Davidson, for Plaintiff.

D. J. DAVIDSON, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. O'CONNOR.

My name is D. J. Davidson; at present I live at Calexico; in December, 1915, I lived in El Centro; at that time I was manager of the Panama Rooms; that is a hotel; to my knowledge I can only recognize one of the defendants, the one on this side; I wouldn't recognize him by name; I have seen this man before at the Panama Rooms, but I don't recall the date; I think I have the register with me of the Panama Rooms.

Mr. O'CONNOR.—Refer to the register, please.

Mr. MORGANSTERN.—To which we object on the ground that it is not such a document or memorandum from which the witness may refresh his

(Testimony of D. J. Davidson.)

recollection as far as the present record is concerned. The proper foundation has not been laid.

The COURT.—The objection is overruled.

Mr. MORGANSTERN.—Exception.

WITNESS.—(Referring to register.) The date is December 22d; I just looked at page 15; the gentleman registered under the name of [73] W. Vines, in my presence.

Mr. O'CONNOR.—I desire to offer the register in evidence.

Mr. MORGANSTERN.—The only objection we have to its introduction is that it is immaterial.

The COURT.—The objection is overruled.

Mr. MORGANSTERN.—Exception.

WITNESS.—He was assigned a room on that occasion; my record shows that somebody occupied the rooms with him; it was a room—consisting of a suite of rooms; a man by the name of George and Sullivan and Vines occupied the suite, called 43; I don't recall whether or not they had any baggage; there were three men in two rooms, one bed in each room; I don't recall having seen the defendant Franklin at that hotel on that night; they came there about 8:30 in the evening George introduced them; George visited in the home room and I went in the home room with him; Mr. Sullivan and Mr. Sullivan and Mr. Vines went to their rooms; I never seen them after that; George was driving a car for the gentlemen who had registered; Mr. Vines made no statement as to how they came to El Centro; they left before I got up in the morning, which is about

(Testimony of D. J. Davidson.)

five o'clock; that would be the morning of December 23; I usually got up at five o'clock; it is hard to say whether or not I did that morning; it might have been half an hour later.

Cross-examination by Mr. MORGANSTERN.

When these three men came into the hotel together Mr. George spoke to me first; there were present Mr. George, Mr. Fullerton and this gentlemen here; I don't remember Mr. George or Mr. Fullerton; George said, just in a casual way, "How do you do?" and introduced his friends, or, rather they registered and I showed their rooms; it all depended on the management of the hotel what time I retired; I was day and night clerk; I ran the hotel; it is possible [74] that George asked me for an alarm clock so as to be able to get up on time; we had 8 or 9 that are left out for that purpose; George possibly knew we had them for that purpose; he had stopped there before; George was an acquaintance of mine and visited with my family and the people around the hotel at times; it was about half-past eight in the evening when they came into the hotel; I don't recall whether any of these three gentlemen asked for a call in the morning, as it is regular in a hotel; Mr. George was the man that introduced them to the hotel; he asked me for the rooms; I don't recall that he told me that he wanted rooms together; it is in a small room, where three come up and we have a suite ready for them, if agreeable to the boys; it is customary to ask them whether it is agreeable to stop together;

(Testimony of Belle M. Riggle.)

it is hard for me to tell whether I asked them on that occasion or not.

Testimony of Belle M. Riggle, for Plaintiff.

BELLE M. RIGGLE, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. O'CONNOR.

My name is Belle M. Riggle; in December, 1915, I was in the Castle Ray Hotel in El Centro; nobody here inside of this railing has been at my house that I know of; this is the register of the Castle Ray Hotel that I had when I was running the hotel in December, 1915; the names therein were registered upon the dates upon which they appear there.

Mr. O'CONNOR.—I desire to offer the register in evidence, your Honor, in connection with the handwriting of the defendant Morris Friedlander, upon the affidavit which is already filed in this case, unless the affidavit be admitted in evidence. The affidavit I will offer in evidence. It has already been filed in this case, your Honor. [75]

Testimony of Earl R. Fullerton, for Plaintiff.

EARL R. FULLERTON, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. O'CONNOR.

My name is Earl R. Fullerton; I live in Los Angeles; I know the two defendants in this case, Mr. Vines and Mr. Franklin; I first met them in San Diego last December, on the night of the 21st; I only

(Testimony of Earl R. Fullerton.)

met one of them, Mr. Vines; I had a conversation with him at that time; I was running a stage line at that time, a sight-seeing car; I came down to the office and Mr. Dodge introduced me to Mr. Vines; he says, "This is the man who is going to make the trip with you to El Centro"; the defendant he introduced to me is Mr. Vines, this tall fellow; I asked him, "How many is going on the trip?" and he says, "Just two of us," and I told him, "The reason I asked you, I was thinking about asking my wife"; so he says, "No,"—there was just him and his brother, and I asked him what time he wanted to go; he says, "We want to start out early and get a good start before the heat of the day in the valley"; that was on the night of the 21st of December last year; next morning I came down to the car and met Mr. George and we went right from there; I didn't know where the hotel was at that time; as I turned the corner the two of them hollered at me and I came and picked them up and stopped at the Cecil for the suitcases; we picked up both Vines and Franklin there; then we went right from there to the stage office; they had brought the two suitcases out from the hotel with them; as nearly as I can remember there was two, the red and the black; they had a few other packages in their hands; they had no other grips; we went from there to the stage office; I telephoned from there and George came over and met us; I says, "Well, you are going to drive, you might as well start right now"; he got in to drive and I sat alongside of him and we started out; the grips were right

(Testimony of Earl R. Fullerton.)

in the back of the car; I didn't notice whether [76] they were heavy or light; I didn't pay any attention to anything until we stopped at the drug-store; we went to El Centro and asked them where they wanted to stop; they said, "Right over there"; we left San Diego on the morning of December 22d; we got to El Centro a little after noon; nobody else was in the car except George and the two defendants and I; before we started they hired me to go to El Centro and probably Brawley; for a three-day trip; Vines made the arrangement; he is the only man I did business with at the time or talked to; when we got to El Centro we stopped at the drug-store; Mr. Vines said, "We will stop right here," I says, "I guess you will want the suitcases," and he says, "Yes." I carried them into the drug-store and set them down; they were light; I asked them where they wanted them and Mr. Vines said, "Just leave them right there; I will take care of them." Then Vines said, "I guess I had better give you some money. You will need some money here." He says, "I will give you twenty-five now. I may go back and may not, and if I don't go back you will get your money." "Well, I says, "I ain't afraid. I guess the money is all right." I says, "I won't go, I have business to attend to, and my brother will go with you." That was around about noon sometime; when we left the Hotel Cecil in the *in the* morning it was about 5:30 or 6; Mr. Franklin and I and Mr. George stopped at a little cafe there and had our lunch. George told him; he says, "I have got a little

(Testimony of Earl R. Fullerton.)

business down there for probably an hour or two. If you want us you will know where to find us." "All right, I will go down with you." And he says, "No, I want to go down; I have a little business to attend to; I will just walk over." Franklin said that; he walked over and George drove the car over to the courthouse and stopped there and he went up to attend to his business; Franklin told us he would meet us at the Barbara Worth Hotel around between three and four o'clock that afternoon, but he told us we had to go to the courthouse first. Yes, sir; these men rented the car [77] from Dodge; I owned the car and Dodge had the business; I paid him a commission out of the business I got; about three or three-thirty that afternoon we went to the Barbara Worth Hotel; we were there quite a while sitting out in the back of the car, and Franklin came and sat and talked with us; George and I were sitting in the car; I asked Franklin if he wanted to go any place and he says, "No, I guess everything is all settled and we will not have to go to Brawley"; he says, "I don't know where he will want to go now until we see him. I have got some business to attend to up town and you don't need to go. I will go on up and meet you at 6 or 6:30 at the drug-store." We went back to the courthouse; we came to the drug-store after we had lunch and stayed there from 6 until pretty near seven; if he wasn't there we were to meet him at the Barbara Worth at 8; we didn't see him there; we left at seven and went back to the Barbara Worth; about 8 o'clock we were inside the

(Testimony of Earl R. Fullerton.)

Barbara Worth; we were waiting for Franklin but Vines came instead; he said his brother was very sick and was over at some friends' house; he says; "You haven't been over this road; if you want to take a trip we will go any place"; so we got in the car and went up to Imperial and got a glass of soda water and came back; Mr. Vines and Mr. George and myself went to Imperial; we put the car in the garage and told him to fill it with gas and oil; I told him, "I guess we will go over to the hotel now and go to bed." Vines says, "Yes, I want to leave to-morrow and get an early start." I told him, "Are you going with us"? He says, "Well, we might as well. We might as well stay together. My brother is over at his friends." I says, "All right, we might as well go over there"; we went over to the Panama Hotel, all three of us, and set around the fire and talked awhile and finally went to bed; I am pretty sure we registered.

Mr. MORGANSTERN.—It is stipulated he would testify the same as the last witness about that register and that hotel. [78]

WITNESS.—We didn't want to bother the landlord so I borrowed an alarm clock and set the clock for I think 4 o'clock; we got up and Mr. Vines went out and says, "I will be back in a few minutes"; we went downstairs and walked up the street and ate our lunch and then went and got the car, that is George and I, and met Mr. Vines at the bottom of the stairs; we all had lunch together and went and got the car; he says, "Now, we will drive over and

(Testimony of Earl R. Fullerton.)

get my brother and Mr. Franklin; we all drove over to the Castle Ray right after we got the car and picked his brother up; this was the morning of the 23d that we went to the Castle Ray, I should judge somewhere between four and 4:30 in the morning; Mr. Vines got out and went in after Franklin; both of them came out together; they picked the suitcases up at the Castle Ray; one defendant carried one and one the other; they set them right in the car, the red one first and the black one next to it, next to the back seat; I was going to get in the front seat with the driver and Mr. Vines said no, his brother was pretty sick, better put him in front next to the glass to keep him warm; so we wrapped the robe all around Franklin's neck and covered him up; I got in the back with Mr. Vines and we started for San Diego; when we got to Warren's Ranch we had our breakfast; we came on down the road and had a blow out; when we got to Spring Valley the sheriff and his party arrested the whole business; he stepped up to the car and we stopped at the watering-trough; George said he had to have water and the tire was pretty flat, and he said, "We will go across the street and get something"; in the meantime the sheriff walked over and wanted to know who was going; "Who owns these suitcases?" Mr. Vines spoke up and says, "Why, I do"; he says, "Take that one"; he took one and the sheriff picked up one; I grabbed one and put it over on the water-trough; the one I picked up was heavy; there was a difference in weight between this time and the time I handled it

(Testimony of Earl R. Fullerton.)

before at the drug-store in El Centro; the sheriff asked who had the keys for them and they said they didn't know; Mr. Vines said, "I don't know; they don't belong to me." [79] "Well," he says, "I will break them open"; "No," he says, "Go on down, I will just take the whole party right in"; he put Mr. Vines in the other car with the suitcases, and Franklin and I and George got in the other car and came on in to the county jail; I don't know where George is now; yes, I saw him here at the last term of court.

Cross-examination by Mr. MORGANSTERN.

At the time the sheriff and Mr. Landis met us at the watering-trough the sheriff wanted to know where the car was going; he then said, "Who do these grips belong to?" I don't know whether those are his words exactly; he says, "Who owns those grips?" and I think Mr. Vines said, "I do"; I didn't hear what Franklin said; I was back of the sheriff and Mr. Vines and very close to all of them; if Franklin said anything I would not necessarily have heard it because I was over on the other side of the car, walking around the back; no, I didn't hear Landis say anything about whose baggage it was at that time; immediately afterwards the sheriff wanted to know who had the keys for the suitcases; nobody answered then, and he turned to Vines and said, "Better give me the keys for the suitcase or I will break it open"; Vines says, "I don't know anything about the case"; I haven't got them; it don't belong to me"; the sheriff searched around him to see what he had, but I didn't see him go in his pockets for any

(Testimony of Earl R. Fullerton.)

keys; he didn't get any keys from him or Friedlander or me; the sheriff was standing there trying to open them with some keys he had in his hand, which he got out of his pocket; yes, he asked all of us about whose baggage it was when he says, "Who do they belong to," and when Vines said, "I do," that was all that was said about that; I am not positively sure about the keys; as I remember I think Mr. Vines gave him a few keys; Vines never referred to Friedlander as his brother in Friedlander's presence; Vines told me he had some presents in the grips, and packages that he was taking over [80] there; he had a lot of bundles with him; those packages were not brought back; yes, when George and Vines—or Gladstone—and I came to the Castle Ray Hotel, Mr. Gladstone went into the hotel and when he came out he brought Friedlander with him; yes, Friedlander had been sick on the trip going over; we had to take care of him on the trip; he was also sick coming back and we wrapped him up and put him in the front seat because of his physical condition; yes, he looked sick, but he walked at an ordinary rate of speed; after we three went to the Castle Ray Hotel Vines came out first with the red suitcase in his hand; I don't know which suitcase was heavier because I only lifted the red one; yes, Franklin came out with the other one in his hand; yes, more than likely I remember the preliminary examination in this case before Mr. Burch; I remember I was a witness there; I don't remember testifying that I helped put them in the automobile; I

(Testimony of Earl R. Fullerton.)

didn't; no, I don't remember testifying that I didn't know who brought them out of the hotel, that when I first saw them they were on the sidewalk with the two men and that I helped lift them into the automobile; I never had my hand on the suitcases until we hit the watering-trough; yes, I had my hand on them when I took them out at El Centro; then he went away with them; Franklin had nothing to do with them; he was in town all the rest of the day and saw us in the afternoon; yes, when I next saw the suitcases one of them was in Vines' hand and the other in Franklin's hand; I didn't see them putting them in; no, I didn't hear Mr. George's testimony at that time; I couldn't help seeing Friedlander carry one of those suitcases out; I was sitting on the right-hand side of the car looking in; the car is a left-hand drive; George did the driving; I did not testify at the preliminary examination that I did not know who brought the suitcases out because I had the hood up and was fixing my carbureter and didn't see the suitcases until they were on the sidewalk; I was not examining the front of the car or anything of that sort at the time these men came out of the hotel; I did not so testify; I have known Mr. [81] George since the latter part of last September or the first of October; no, I have not talked with any official of the Government, either the District Attorney's office or customs department, since the hearing before Judge Burch, about this case at any time; I talked to Mr. O'Connor and Mr. Moody about it in an offhand way; they asked me a few questions but

(Testimony of Earl R. Fullerton.)

not about the case; they didn't ask me what I would testify to; nor did any other member of the District Attorney's office; they never asked me and I never told them. Yes, I have been convicted of a felony in this state; yes, I have been convicted of a felony prior to coming to this state.

Testimony of William Carse, for Defendants.

WILLIAM CARSE, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. MORGANSTERN.

My name is William Carse; I am Deputy United States Marshal; I was present at the preliminary examination before the committing magistrate, C. E. Burch, in the matter now on trial; I heard the testimony of the witness Fullerton and a man named George; yes, the witness Fullerton testified upon the preliminary examination that the defendant Friedlander was a very sick man and that it was necessary to bundle him up and help him in the car and that he couldn't have lifted either of the grips.

Cross-examination.

I am positive that it was Mr. Fullerton who made that full statement, as to the lifting of the grips too. I was present during the biggest portion of the preliminary hearing; the hearing was the next day after the arrest, my records will show; I did not testify at that preliminary; besides George and Fullerton, Capt. Rynning, Paul Landis and W. B. Evans testified. [82]

Testimony of Morris Friedlander, in His Own Behalf.

MORRIS FRIEDLANDER, defendant herein, having been duly sworn as a witness on behalf of defendants testified as follows:

Direct Examination by Mr. MORGANSTERN.

My name is *Horace* Friedlander; I know my co-defendant, Mr. Gladstone; I have known him one year; I first knew him by the name of Gladstone after we were arrested; prior to that time I knew his name to be William Vines; I happened to go upon this trip to El Centro with him, because I met him in Los Angeles and he asked me how I felt; I told him I had been under a doctor's care for three years and he said he was going on a trip down the valley to look over the territory, that he intended opening up a chain of stores, if the country looked good, and that he might be able to put me in charge of one of the stores; I knew he was a dealer in all kinds of merchandise; I had met him first in San Francisco in auction places where they sell all kinds of merchandise, Government sales; at that time his business was buying of merchandise at auction sales; I have often seen him bid on articles; I and Gladstone came from Los Angeles to San Diego together; no, I did not register at the Cecil Hotel; Vines registered there; I did not see what names he placed upon the register; I was going to register and he says, "I have registered for you"; no, upon leaving the Hotel Cecil and going to El Centro I did not see any grips in the car; I first saw the grips when we arrived at El Centro; they stopped in front

(Testimony of Morris Friedlander.)

of the drug-store; I was sitting there with the car, and Fullerton got off the front seat and opened up the door where I was sitting and pulled the grip from beneath the blanket. I think it was; he took the grips in the drug-store; I couldn't swear that those are the grips that I saw at that time, there are hundreds of grips made like them, I didn't pay any attention to them; I was sick and was huddled up; after Fullerton had taken the grips out of the automobile [83] he took them into the drug-store; I did nothing, just sat there; Fullerton and Vines, I believe, got out of the automobile at that point and did not get back into the automobile; then Fullerton, George and I drove to the restaurant; Vines didn't get back into the car; during the afternoon that day I was around town, I met Fullerton and George in front of the Barbara Worth Hotel at 3 o'clock and remained with the boys for about an hour or so, and then left them, I think about 4:30; I said I would meet them at 6:30; I did not meet them at 6:30; I met Vines in front of the drug-store at 6:30; he asked me where the machine was, and I told him it was over at the Barbara Worth Hotel; he said, "You are looking ill," he said, "You had better go to bed"; I went to the Castle Ray Hotel and retired for the evening; I never had either of the grips in my hand at any time; I did not carry either of these grips out of the Castle Ray Hotel; I did not know either of these grips were at any time in the Castle Ray Hotel; I did not know at any time that either of these grips contained opium; I have

(Testimony of Morris Friedlander.)

never, either in this instance or any other, assisted in the transportation or carriage or importation of opium.

Cross-examination by Mr. O'CONNOR.

I am thirty-two years old; I have been a solicitor and cigar clerk in San Francisco; yes, that occupation would naturally take me to auction places to buy goods, shirts and shoes; I would not go as often as every day; besides I also met Mr. Vines at the Big Smoke House cigar-store; no, I met him at auctions before that; he was buying everything mentionable in large and small quantities; I bought small quantities; at these auction-houses the auctioneer sells job lots and I bought in lots; I don't remember who introduced me to Vines; it was about a year prior to September, 1915, two years ago at this time, that I met him; [84] during the year that I knew him prior to the trip we made to El Centro, I would probably see him once a week, maybe twice a week; we became friendly; we would walk a block or two or five together and I would have a drink with him, or go to places of amusement with him; I knew nothing wrong about the man; he had a reputation of being a very shrewd buyer and dealer in merchandise of all kinds; he first suggested to me that he might take me into business with him when I met him in Los Angeles; I was in Los Angeles to arrange for going into business; I believe it was December 21 when I met him in Los Angeles; I got there that morning; I don't know how long he had been there; I have no idea what he was doing there; I met him

(Testimony of Morris Friedlander.)

in a restaurant, I believe it was the St. Elmore; I just happened to meet him there; I did not know where he was stopping; I had just been there about an hour; I was going up to see my old office; I did not know Vines was in Los Angeles; when I first met him and until after we were arrested I knew him under the name of William Vines; when I met him on December 21 he told me he was going down the valley; he said it was a good country to go in business; he asked me to take the trip with him; I went down at his invitation; I don't know what kind of business, handling goods; he had a chain of stores called the Live Wire, about six months previous to that; one was on Mission Street, in San Francisco; I believe all of them were located in San Francisco; at the time I was talking to him in Los Angeles I think he said he had sold out; he lost considerable money in the venture; at the time I met Vines in Los Angeles I was a solicitor; previous to that I had solicited for L. Becker in San Francisco; I was going to Los Angeles to solicit for myself; I often did; I had a man named Magenson in the Johnson Building do the work for me; Vines knew me by my right name, Friedlander; my true name is Morris Friedlander; I don't know if he knew my first name; he called me Morwy; I couldn't say what my particular occupation was going to be in these stores; I was not much bent on the venture of going into business but I was feeling ill and thought the trip [85] would do me some good; no, I was not going to put any money in with Vines in those stores; we had no

(Testimony of Morris Friedlander.)

understanding in reference to what position I was to have in the stores or where the stores *or where the stores* were to be located; he didn't tell me in Los Angeles where we were first going on this trip, no particular place; we came from Los Angeles to San Diego by stage at 2 o'clock on December 21st; I didn't see Vines have any grips with him when we left Los Angeles on the stage; there were other people on the stage; I met him in front of the office where he engaged the machine in the same block where I met him in the restaurant; I had no baggage with me for if I was not successful in Los Angeles I was going to return to San Francisco; when we were on our way—when we left here, San Diego, he said he was going to El Centro; when we came to San Diego we went to the Cecil Hotel and both stayed in the same room that night; we had no conversation about this business project we were going into over in the valley; he said he was going out to see some business friend, and for me to go to bed; I had been sick right along; I had been ailing for three years; I didn't see any grips until we reached El Centro; I don't say that the testimony of the witnesses to the effect that they were carried out of the Cecil Hotel in my presence is all wrong; I didn't see them; yes, that black grip is really a sample case, the kind of case solicitors use in their business; I don't know if cigar solicitors use that kind of cases; I don't know who those grips belong to that were in that car; I don't know how long Vines had been in Los Angeles when I met him or where he came from; no, he didn't say where he was

(Testimony of Morris Friedlander.)

stopping; on the way to El Centro Vines said nothing about this projected business we were going into; when I met him in Los Angeles it had been about three weeks to a month since I had seen him in San Francisco; no, I had never had any experience in handling stores of the kind he was going to open up down the valley; no, I had never worked in a store of that kind, I had no experience at all in that kind of business; nobody that I know of was going to be financially interested in [86] this project with Vines; when we got to El Centro I went to the Castle Ray Hotel and stopped there that night; yes, I registered; Vines told me that he had a brother that he expected in town and for me to engage a room for his brother, and because I was going I suggested that I engage rooms for Vines and myself; he says, no his brother made this appointment; in that case, why, one of us would share the room, occupy the room; when I went there there was a gentleman there; I asked him for a room; he said that the landlady was out but he would show me a room and I could pay her in the evening when she returned; I told him I engaged the room for a friend of mine and that if he failed to show up I would occupy it or my friend would that I was with; he says, "All right"; he assigned me to a room, and I went out that day and met Fullerton at 4:30 and then met Vines in the evening and returned to the hotel and the landlady hadn't returned; I waited around until 9 o'clock and then walked out; when I came back she still wasn't there; I went to my room to retire, but having no baggage

(Testimony of Morris Friedlander.)

I thought she might disturb me and knock at my door, and I thought best to stay up and wait until she came; I walked out again I believe at 10 o'clock; she just entered the hall and I gave her the dollar and then retired; yes, I registered for Vines, for his brother; yes, that signature "R. Vines" in the register of the Castle Ray Hotel is my signature; I don't know why I didn't stop at the Castle Ray Hotel with Vines that night, and Fullerton and George; he told me to retire as I was feeling ill; I thought Vines was going to stop there too and I told him I was stopping there; he said he was over to the hotel before he had seen me; he said he noticed I had registered there for his brother; no, Vines did not give any explanation why he didn't stop at the Castle Ray Hotel; I didn't know he was going to stop at another hotel; he didn't say he would; I didn't ask him anything about that and I didn't know until the next day where he was stopping; yes, I was present when Vines got out at the drug-store upon arrival at El Centro and I saw the grips at that time; they were taken at that time into the drug-store by Fullerton; it was when we were coming [87] into El Centro that I had the conversation with Vines about registering at the Castle Ray Hotel; no, I didn't see these grips at the hotel Castle Ray at all, and I didn't see them brought out to the machine next morning; yes, we left about four o'clock in the morning to come back to San Diego; yes, I heard the testimony of Captain Rynning yesterday, and Paul Landis, deputy sheriffs, to the effect that when I got to the

(Testimony of Morris Friedlander.)

jail I gave the name of Franklin; I did that because I didn't want my people to know that I was arrested; I didn't use my own name at the Castle Ray Hotel because Vines directed me to register for his brother; I did not have any idea at the time where Vines was going to stop; no, I did not expect to occupy the same room with Vines' brother that night.

Redirect Examination.

When the officers accosted us in the automobile the first thing said was, "Pile out. You are all under arrest"; after that, after I asked George what the trouble was, I turned around and Captain Rynning was addressing Vines; he asked for the keys, and Vines says, "I have no keys"; no, sir; I didn't at any time state that "These are ours" or "I own them" or "I do," or anything of that kind.

Los Angeles, California, Monday, October 2d, 1916.

10 A. M.

The following proceedings were had at the time set for sentence of the defendants William Vines and H. Franklin.

The COURT.—United States against William Vines and H. Franklin.

Mr. MORGANSTERN.—If the Court please, this is the time fixed for sentence of the defendants William Vines and H. Franklin, and at this time the defendants move that the Court continue the time of passing sentence on the defendants to some later date sufficient in time to permit these defendants to have their application for executive clemency passed upon by the President of the United States. The

application for executive clemency has been [88] made and is now pending before the President of the United States. The grounds upon which this application for executive clemency is being made are the same that have already been gone into in detail before your Honor prior to the trial of this cause, and these defendants are making this motion at this time, based upon the same grounds heretofore made, because at the time this motion was made before at the trial of this cause, the United States Attorney opposed the defendants' motion for a continuance on the ground that the proper time to make such an application to the President of the United States was after conviction and not prior thereto. Therefore to save our rights in the premises we now renew the motion for a continuance of the time fixed for pronouncing sentence until the defendants' application for executive clemency can be passed upon by the President of the United States.

The COURT.—Motion denied.

The defendants, William Vines and H. Franklin, hereby present the foregoing as their proposed bill of exceptions herein, and respectfully ask that the same may be allowed.

Attorney for Defendants. [89]

TO ALBERT SCHOONOVER, Esq., United States
District Attorney:

Sir: You will please take notice that the foregoing constitutes and is the proposed Bill of Exceptions of the defendants William Vines and H. Franklin in

the above-entitled action, and that said defendants will ask the allowance of the same.

A. J. MORGANSTERN,

PAUL W. SCHENCK,

Attorneys for Defendants.

It is hereby stipulated that the foregoing Bill of Exceptions is correct and that the same be settled and allowed by the Court.

A. J. MORGANSTERN,

PAUL W. SCHENCK,

Attorneys for Defendants.

Attorney for the United States.

This bill of exceptions having been presented to the Court, and having been amended to correspond to the facts, is now signed and made a part of the records in this cause, the question as to whether presented in time is submitted to Court of Appeal.

OSCAR A. TRIPPET,

Judge. [90]

[Endorsed]: No. 1063—Crim. In the United States District Court for the Southern District of California, Southern Division. The United States of America, Plaintiffs, vs. William Vines and H. Franklin, Defendant. Defendants' Proposed Bill of Exceptions. Received copy of the within this 12 day of Oct., 1916. Robert O'Connor, Asst. U. S. Atty. Filed Oct. 12, 1916. Wm. M. Van Dyke, Clerk. By Geo W. Fenimore, Deputy Clerk. Paul W. Schenck, 619-26 Homer Laughlin Bldg. Los Angeles, Cal., Main 1005, F2151, Attorney for Defendants.

[Endorsed]: Re-filed June 28, 1917. Wm. M. Van Dyke, Clerk. By Geo. W. Fenimore, Deputy Clerk, as Approved and Allowed Bill of Exceptions. [91]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division, Ninth Circuit.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM VINES and H. FRANKLIN,

Defendants.

Petition for Writ of Error.

Your petitioners, William Vines and H. Franklin, the defendants in the above-entitled cause, bring this, their Petition for Writ of Error, to the District Court of the United States, in and for the Southern District of California, Southern Division, and in that behalf your petitioners say:

That on the 13th day of September, 1916, there was made, given, rendered and entered in the above-entitled Court a verdict against your petitioners, wherein and whereby your petitioners, the said William Vines and H. Franklin, were found guilty as charged in the indictment in the above-entitled cause. That thereafter, on the 2d day of October, 1916, your petitioner, William Vines was sentenced to confinement in the penitentiary for a period of eighteen months; and your petitioner H. Franklin was sentenced to confinement in the County Jail for a period of six months; that your petitioners say that they are

advised by counsel and aver that there was and is manifest error in the record and proceedings had in such cause and in the making, giving, rendition and entry of such judgments and sentences, to the injury and damage of your petitioners, all of which error will be more fully made to appear by an examination of said record, and by an examination of the bill of exceptions to be hereafter by your petitioners tendered and filed, and in the assignment of errors hereinafter set [92] out, and to the end hereafter that the said judgments, sentences and proceedings may be reviewed by United States Circuit Court of Appeals for the Ninth Circuit, your petitioners now pray that a Writ of Error may be issued, directed therefrom to the said District Court of the United States for the Southern District of California, Southern Division, returnable according to law and the practice of the Court, and that there may be directed to be returned, pursuant thereto, a true copy of the record, bill of exceptions, assignment of errors, and all proceedings had and to be had, in said cause; that the same may be removed unto the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the error, if any has happened, may be duly corrected and full and speedy justice done your petitioners.

And your petitioners now make the assignment of errors attached hereto, upon which they will rely and which will be made to appear by a return of the said record in obedience to said Writ.

WHEREFORE, your petitioners pray the issuance of a Writ as herein prayed, and pray that the assignment of errors annexed hereto may be consid-

ered as the assignment of errors upon the Writ, and that the judgment rendered in this cause may be reversed and held for naught, and that said cause may be remanded for further proceedings and that they be awarded a *supersedeas* upon said judgment and all necessary process, including bail.

WILLIAM VINES,

Petitioner.

H. FRANKLIN,

Petitioner.

A. J. MORGANSTERN,

PAUL W. SCHENCK,

Attorneys for Defendants.

[Endorsed]: No. 1063—Crim. In the United States District Court, for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. William Vines and H. Franklin, Defendant. Petition for Writ of Error. Filed Oct. 2, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Paul W. Schenck, 619-26 Homer Laughlin Bldg., Los Angeles, Cal., Attorney for Defendants, Main 1005, F2151. [93]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIM VINES and H. FRANKLIN,

Defendants.

Assignment of Errors.

William Vines and H. Franklin, the defendants in the above-entitled cause and plaintiffs in error herein, having petitioned for an order from the above-entitled Court permitting them to procure a Writ of Error from said Court, directed to the United States Circuit Court of Appeals, for the Ninth Circuit, from the judgment and sentence made and entered in said cause against the said William Vines and the said H. Franklin, plaintiffs in error and petitioners herein now make and file with their said petition the following assignment of errors herein, upon which they will rely for a reversal of said judgment and sentence upon the said writ, and which said errors and each and every of them are to the great detriment and injury and prejudice of the said defendants, and in violation of the rights conferred upon them, and they say that in the record of proceedings had in the above-entitled cause upon the hearing and determination thereof in the District Court of the United States for the Southern District of California, Southern Division, there is manifest error in this, to wit:

I.

That the Court erred in denying the motion of the defendants above named for a continuance of the trial of the above-entitled cause. Said motion for continuance being made for the purpose [94] of submitting to the President of the United States an application for executive clemency in the above-entitled cause, on behalf of the said defendants.

II.

That the Court erred in overruling the objection of the defendants to the question put to the witness Thomas L. Rynning: Q. "What conversation did you have in the presence of these defendants when you first went up to the automobile?" Said objection being taken as follows: "We object to any conversation held by or in the presence of the defendants, which seeks to elicit any possible statement by the defendant or actions of the defendants, upon the ground that it is incompetent, irrelevant and immaterial, until the *corpus delicti* shall have first been established," and the defendants' exception to the ruling on said objection was duly and regularly taken and allowed.

III.

That the Court erred in overruling the motion of the defendants above named for a continuance of the time for pronouncement of judgment and sentence in the above-entitled cause upon said defendants. Said motion for continuance being made for the purpose of submitting to the President of the United States an application for executive clemency in the above-entitled cause, on behalf of said defendants.

IV.

That the Court erred in refusing to give the following instruction to the jury, as requested by the defendants: "You are instructed that the evidence adduced in this case is insufficient to warrant or sustain a conviction of the defendants, or either of them, and I therefore instruct you to find the defendants not guilty on said indictment." [95]

V.

That the Court erred in pronouncing sentence against the defendants.

A. J. MORGANSTERN,
PAUL W. SCHENCK,
Attorneys for Defendants.

United States of America,
Southern District of California,
Southern Division,—ss.

We hereby certify that the foregoing assignment of errors are made on behalf of the petitioners for Writ of Error herein, and in my opinion well taken, and that the same now constitute the assignment of errors upon the writ prayed for.

A. J. MORGANSTERN,
PAUL W. SCHENCK,
Attorneys for Plaintiffs in Error.

[Endorsed]: No. 1063—Crim. In the United States District Court, for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. William Vines and H. Franklin, Defendants. Assignment of Errors. Filed Oct. 2, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Paul W. Schenck, 619-26 Homer Laughlin, Bldg., Los Angeles, Cal., Main 1005, F2151, Attorney for Defendants. [96]

*In the District Court of the United States in and
for the Southern District of California, South-
ern Division.*

1063—CRIM.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM VINES and H. FRANKLIN,

Defendants.

Order Allowing Writ of Error and Supersedeas.

Upon motion of Paul W. Schenck, attorney for the defendants William Gladstone, *alias* William Vines, and Morris Friedlander, *alias* H. Franklin, and upon filing the petition for a writ of error and assignment of errors, IT IS HEREBY ORDERED that a writ of error be, and hereby is allowed to have reviewed in the United States Circuit Court of Appeals, for the Ninth Circuit, the verdict and judgment heretofore entered herein. That pending decision upon said writ of error, the supersedeas prayed for by the defendants in their petition for a Writ of Error herein, is hereby allowed upon the giving by the defendant William Gladstone, *alias* William Vines of bail in the sum of \$5,000, and upon the giving by the defendant Morris Friedlander, *alias* H. Franklin, of bail in the sum of \$2,000.

Done in open court this 2d day of October, 1916.

OSCAR A. TRIPPET,

District Judge of the United States District Court
for the Southern District of California, South-
ern Division.

[Endorsed]: No. 1063—Crim. In the District Court of the United States for the Sou. Dist. of California, Southern Division. United States of America, Plaintiff, vs. William Vines and H. Franklin, Defendants. Order Allowing Writ of Error and Supersedeas. Filed Oct. 2, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy. [97]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California.

CLERK'S OFFICE.

No. 1063—CRIM.

A. GLADSTONE, *alias* W. H. VINES,
Plaintiff in Error,
vs.

UNITED STATES OF AMERICA.

Praecipe for Transcript of Record.

To the Clerk of said Court:

Sir: Please issue Transcript in above-entitled matter making true records of the following for record on appeal:

1. Judgment-roll.
2. Petition for Writ of Error.
3. Assignment of Errors.
4. Writ of Error.
5. Citation to Writ of Error.
6. Bill of Exceptions.

A. J. MORGANSTERN,
Atty. for Plaintiff in Error.

[Endorsed]: No. 1063—Criminal. U. S. District Court, Southern District of California, Southern Division. United States of America vs. Vines et al. Praeipe for Transcript. Filed Jul. 2, 1917, at 2 min. past 10 o'clock A. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. [98]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

No. 1063—CRIMINAL.

THE UNITED STATES OF AMERICA,

Plaintiffs,

WILLIAM VINES, True Name ALEXANDER GLADSTONE, and H. FRANKLIN, True Name MORRIS FRIEDLANDER,

Defendants.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing ninety-eight typewritten pages, numbered from 1 to 98, inclusive, and comprised in one volume, to be a full, true and correct copy of the Judgment-roll, Bill of Exceptions, Petition for Writ of Error, Assignment of Errors, Order Allowing Writ of Error, and Supersedeas, and Praeipe for Transcript in the above and therein entitled action, and that the same together constitute the record in said action as specified in the said Praeipe filed in

my office on behalf of the plaintiffs in error by their attorneys of record.

I do further certify that the cost of the foregoing record is \$25.25, the amount whereof has been paid me by the plaintiffs in error herein.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, this 3d day of July, in the year of our Lord one [99] thousand nine hundred and seventeen and of our Independence the one hundred and forty-first.

[Seal] WM. M. VAN DYKE,
Clerk of the District Court of the United States of
America, in and for the Southern District of
California. [100]

[Endorsed]: No. 3017. United States Circuit Court of Appeals for the Ninth Circuit. William Gladstone, *alias* William Vines, and Morris Friedlander, *alias* H. Franklin, Plaintiffs in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

Filed July 5, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

At a stated term, to wit, the October term, A. D. 1916, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Courtroom thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the sixth day of June, in the year of our Lord one thousand nine hundred and seventeen. Present: The Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presiding; Honorable WILLIAM H. HUNT, Circuit Judge; Honorable MAURICE T. DOOLING, District Judge.

WILLIAM GLADSTONE, *alias* WILLIAM
VINES,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Order Enlarging Time to File Transcript of Record.

Upon motion of Mr. Benjamin L. McKinley, counsel for the plaintiff in error, and good cause therefor appearing, ORDERED plaintiff in error granted thirty (30) days from and after this 6th day of June, A. D. 1917, to file with the clerk of this Court a certified typewritten Transcript of Record in the above-entitled cause.

No. 3017

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALEXANDER GLADSTONE, alias William Vines,
Plaintiff in Error,
VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court of the
Southern District of California, Southern Division.

BENJAMIN L. MCKINLEY,
A. J. MORGANSTERN,
Attorneys for Plaintiff in Error.

Filed this.....day of September, 1917.

Filed
FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

F. D. Monckton.

No. 3017

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALEXANDER GLADSTONE, alias William Vines,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Upon Writ of Error to the United States District Court of the
Southern District of California, Southern Division.

Statement of the Case.

The plaintiff in error, Alexander Gladstone, indicted under the name of William Vines, was indicted jointly with one Morris Friedlander, alias H. Franklin, in the United States District Court for the Southern Division of the Southern District of California, upon a charge that they did, on December 23, 1915, in the County of San Diego, knowingly, unlawfully, wilfully and feloniously have in their possession, receive, conceal, transport and facilitate the transportation and concealment

of a quantity of opium prepared for smoking, which said opium was then and there contained in one hundred eighty cans of the size and style commonly denominated five-tael, and which said opium had been imported into the United States subsequent to the first day of April, 1909, contrary to law, all of which was well known to said defendants at the time they so received, concealed, transported and facilitated the transportation and concealment of said opium. The indictment is found on pages 5, 6 and 7, Transcript of Record.

The defendant Friedlander or Franklin did not pursue his writ of error and accordingly the Gladstone case is the only one before this Court.

The defendant Gladstone or Vines was arraigned January 17, 1916, answered his true name and pleaded not guilty to the indictment (page 8, Transcript of Record). On September 12, 1916, when the cause came on for trial, the defendant's counsel made a motion for a continuance of the trial. The motion, the affidavits in support thereof, the testimony taken in support of the motion, and the action of the Court in denying the continuance is found in the transcript of record. pages 38 to 53 inclusive.

The motion for continuance (page 38, Transcript of Record) states the fact

“That heretofore a stipulation was had by and between John B. Elliott, Collector of Customs for the Port of Los Angeles, and A. J. Morganstern, Esq., attorney for the above-named defendant. The nature of which and the full purpose of which are set out in the

affidavits of A. Gladstone and Morris Friedlander, on file herein, hereby referred to and by such reference made a part hereof as fully as though the same had been specifically herein impleaded. It is now apparent to the defendant and to their counsel that there is no intention upon the part of the Government to keep the said stipulation and the purpose of the proposed continuance is to enable the above-named defendants to apply to the President of the United States for executive action in the matter, in the manner by law provided.

This motion will be based upon the affidavits of A. Gladstone, Morris Friedlander and C. E. Burch, filed herein, and upon the records and files in the above-entitled court in the above-entitled cause."

The affidavit of A. Gladstone (pages 39 and 40, Transcript of Record) sets forth in substance that he is one of the defendants in the pending action; that he was arrested with his codefendant in San Diego County, California, and lodged in the county jail in said county; that while so incarcerated he retained A. J. Morganstern, Esq., as his attorney, and that he was advised by said A. J. Morganstern that he had had a conference with Hon. John B. Elliott, Collector of Customs for the Port of Los Angeles, and that the said Elliott had agreed with said Morganstern that if the affiant, Gladstone, would truthfully disclose where the opium was obtained which he was charged with transporting, and where it was to be delivered, that recommendation would be made to the office of the District Attorney that the case against Friedlander, or Franklin, would be dismissed, and that upon the

plea of guilty by Gladstone a nominal fine would be suggested to the Court as satisfactory to the Government. That Gladstone thereupon agreed to make full and complete disclosure as he could, and that in a day or two afterwards he was taken to the office of Mr. Elliott in the Federal Building, in San Diego, and there in the presence of U. S. Commissioner Burch, John B. Elliott and Mr. Morganstern, his attorney, the same stipulation which Mr. Morganstern had repeated to him, Gladstone, was again entered into between Mr. Morganstern and Mr. Elliott in the presence of Commissioner Burch and Gladstone, and that Gladstone was assured by Mr. Elliott that nothing he might say would be used against him, or for any other purpose than for carrying out said agreement and stipulation.

Gladstone proceeds further to state in his affidavit that he thereupon told Mr. Elliott all he knew of the transaction, from beginning to end, fully, fairly and truthfully. He further states that he is now informed by his attorney and upon information and belief alleges the fact to be that there is no intention upon the part of the Government, represented by its Collector of Customs, to carry out the promise made to him, and that upon a later occasion upon an application addressed to the Court, while Judge Cushman was presiding, for the reduction of Friedlander's bail, the Assistant District Attorney present started to read from a transcription from Gladstone's statement to Collector Elliott, and

sought to use the same in contesting the application for reduction of bail, and did read a portion thereof until stopped by the Court, upon objection by Mr. Morganstern, from further using it.

Friedlander's affidavit (pages 41-42, Transcript of Record) recites the fact as to his arrest and incarceration, and his employment of Mr. Morganstern to represent him. He then proceeds to state in substance that he was taken to the office of Mr. Elliott in the Federal Building at San Diego, and that in the presence of Mr. Elliott, Mr. Morganstern and U. S. Commissioner Burch, was told by Morganstern that the purpose of his being called there was as follows:

"That Mr. Gladstone had assured Mr. Elliott, the Commissioner, and Mr. Morganstern, that I had no knowledge whatever of the purpose of the trip Gladstone and I had taken, and was entirely unaware of the fact that opium was being transported, and that I played no part therein, and that it was stipulated between Mr. Morganstern and Mr. Elliott that if both Gladstone and I should tell all we knew and should fully and fairly disclose the truth, that the case against me would be dismissed and that the Government would suggest a fine in the Gladstone case. Thereupon, in the presence of the persons stated, I fairly, fully and truthfully stated all that I knew about the trip to Mr. Elliott, expecting that as a result thereof the promise made on behalf of the Government by the said John B. Elliott would be kept; that I am entirely innocent of any wrongful act charged against me in connection with the above-entitled matter."

It was stated by Mr. Morganstern, counsel for the defendant Gladstone (page 43, Transcript of Record), and this was not disputed, that at one conference between Mr. Elliott and Mr. Morganstern Mr. Schoonover, the U. S. Attorney, was present; that this conference was held after the finding of the indictment, and that Mr. Schoonover knew the statements that were being taken. This was in answer to the suggestion by the Assistant U. S. Attorney Mr. O'Connor (page 43, Transcript of Record) that the case being in the hands of the District Attorney's office, negotiations should have been had with that office. U. S. Commissioner Burch was called as a witness for the Government in the matter of this application for a continuance, and his testimony is found on pages 45 and 46 of the Transcript of Record. His testimony sheds but little light upon the interview of Mr. Elliott with Gladstone, Friedlander and Morganstern. He did not hear any conversation held between Mr. Elliott and Mr. Morganstern (page 46, Transcript of Record). He does not undertake to give the details of the conversation held in his presence, in fact he says he cannot recall the details of the conversation (page 46, Transcript of Record) and the only conclusion that can be drawn from his testimony is that other things were said which he either did not hear or does not remember. There was one witness whose testimony would have been vital in support of the position of the Government that no such promises had been made, as are stated in the

affidavits. That witness was Collector John B. Elliott. He was not called and no excuse appears for failure to call him. Mr. Schoonover, the United States Attorney, was not called, and no excuse or reason appears in the record for not calling him. Under a rule which is too well settled to require the citation of authorities, it should be presumed, at least in the case of Mr. Elliott, that if he had been called he would have given testimony unfavorable to the contention of the Government.

The testimony of A. J. Morganstern, counsel for the defendants, found on pages 47 to 53, Transcript of Record, is a detailed statement of the entire transaction with reference to the promises made by Mr. Elliott. This statement fully bears out the statement made in the affidavits already referred to. It appears that a promise was made; that Gladstone told the story in answer to interrogatories by both Mr. Elliott and Mr. Morganstern; that Mr. Elliott made lead pencil notes of the conversation, and that Mr. Morganstern asked additional questions whenever necessary to elicit the entire truth (pages 48 and 49, Transcript of Record).

It appears further that a conversation was had with Mr. Schoonover, the United States Attorney, in which he said he would not *nolle pros.* the case because "we cannot convict anybody else on this testimony" (page 49, Transcript of Record). Mr. Morganstern replied (pages 49 and 50, Transcript of Record):

"That was not agreed, Mr. Schoonover, with Mr. Elliott, nor was it ever discussed; no promise was ever made by me or by the defendants that they would give you evidence which would convict somebody else; I agreed with Mr. Elliott to have these defendants tell him whatever they knew about their trip, to have Gladstone tell him where the opium was obtained, how it was obtained, and whence it was to be delivered, all of which Gladstone did, I thought at the time, fully and fairly."

Without calling Mr. Elliott or Mr. Schoonover as a witness the Court denied the motion for a continuance and the defendant took exception to the ruling (page 53, Transcript of Record). A jury was then empaneled and the trial proceeded, the testimony of the witnesses being found on pages 53 to 85 inclusive, Transcript of Record. That testimony shows substantially that on September 23, 1915, the defendants were arrested at a place called Spring Valley, in an automobile driven by a man named George, and accompanied by another man named Fullerton. That in the automobile were found a suit case and a black box, to which neither of the defendants had any keys (page 54, Transcript of Record). In the course of the testimony of the witness Thomas L. Rynning the following occurred (pages 53 and 54, Transcript of Record):

"Q. (by Mr. O'CONNOR). What conversation did you have in the presence of these defendants when you first went up to the automobile?

MR. MORGANSTERN. We object to any conversation either by or in the presence of the

defendants which seeks to elicit any possible statement by the defendants or actions of the defendants, upon the ground that it is incompetent, irrelevant and immaterial until the *corpus delicti* shall first have been established.

The COURT. State what was said.

Mr. MORGANSTERN. Exception."

The man George was not produced as a witness on the trial, his absence was not accounted for, and while there is no satisfactory or sufficient showing as to who was the owner of either of the receptacles containing the opium, there is as much evidence that George was the sole owner as there was that they were owned by anyone else.

At the close of the testimony for the prosecution, as shown by the minutes of the Court, defendant's counsel moved the dismissal of the cause (bottom page 14, top of page 15, Transcript of Record). The motion was denied and an exception taken to the ruling of the Court. The jury thereafter found the defendants guilty as charged. At the time fixed for pronouncing judgment a motion was made by Mr. Morganstern for the defendants for postponement to a later date of the passing of sentence on the defendants sufficient in time to permit the defendants to have their application for executive clemency passed upon by the President of the United States. The proceedings at that time are set forth on pages 85 and 86, and are as follows:

"Mr. MORGANSTERN. If the Court please, this is the time fixed for sentence of the defendants William Vines and H. Franklin, and at this

time the defendants move that the Court continue the time of passing sentence on the defendants to some later date sufficient in time to permit these defendants to have their application for executive clemency passed upon by the President of the United States. The application for executive clemency has been made and is now pending before the President of the United States. The grounds upon which this application for executive clemency is being made are the same that have already been gone into detail before your Honor prior to the trial of this cause, and these defendants are making this motion at this time, based upon the same grounds heretofore made, because at the time this motion was made before at the trial of this cause, the United States Attorney opposed the defendants' motion for a continuance on the ground that the proper time to make such an application to the President of the United States was after conviction and not prior thereto. Therefore to save our rights in the premises we now renew the motion for a continuance of the time fixed for pronouncing sentence until the defendants' application for executive clemency can be passed upon by the President of the United States.

The COURT. Motion denied."

The sentence was thereupon pronounced against the defendant, of imprisonment for the term of eighteen months in the United States Penitentiary at McNeil Island, Washington (page 35, Transcript of Record).

SPECIFICATION OF ERRORS RELIED UPON.

The assignment of errors (pages 91 to 93, Transcript of Record) assigns the following errors in the proceedings in the Court below:

“I.

“That the Court erred in denying the motion of the defendants above named for a continuance of the trial of the above-entitled cause. Said motion for continuance being made for the purpose of submitting to the President of the United States an application for executive clemency in the above-entitled cause, on behalf of the said defendants.

II.

That the Court erred in overruling the objection of the defendants to the question put to the witness Thomas L. Rynning: Q. ‘What conversation did you have in the presence of these defendants when you first went up to the automobile?’ Said objection being taken as follows: ‘We object to any conversation held by or in the presence of the defendants, which seeks to elicit any possible statement by the defendant or actions of the defendants, upon the ground that it is incompetent, irrelevant and immaterial, until the *corpus delicti* shall have first been established,’ and the defendants’ exception to the ruling on said objection was duly and regularly taken and allowed.

III.

That the Court erred in overruling the motion of the defendants above named for a continuance of the time for pronouncement of judgment and sentence in the above-entitled cause upon said defendants. Said motion for continuance being made for the purpose of submitting to the President of the United States an application for executive clemency in the above-entitled cause, on behalf of said defendants.

IV.

That the Court erred in refusing to give the following instruction to the jury, as requested

by the defendants: 'You are instructed that the evidence adduced in this case is insufficient to warrant or sustain a conviction of the defendants, or either of them, and I therefore instruct you to find the defendants not guilty on said indictment.'

V.

That the Court erred in pronouncing sentence against the defendants."

These assignments may be divided for convenience into the following heads:

1. The Court committed error in refusing a continuance of the trial for the purpose of making application to the President for executive clemency, and committed the same error in refusing a continuance of the time for pronouncing judgment for the same purpose. The proceedings upon the application for continuance of the trial are found on pages 38 to 53 of the Transcript of Record, and those upon the refusal of the continuance of the time of pronouncing judgment are found on pages 85 to 86 of the Transcript of Record.

2. The Court erred in permitting the question (pages 53 and 54, Transcript of Record) put by the prosecution to the witness Thomas R. Rynning: "What conversation did you have in the presence of these defendants when you first went up to the automobile?" Said objection being taken as follows: "We object to any conversation either by or in the presence of the defendants which seeks to elicit any possible statement by the defendants or actions of the defendants, upon the ground that

it is incompetent, irrelevant and immaterial until the *corpus delicti* shall first have been established."

3. That the evidence was insufficient to justify a conviction; that Section 3 of the Act of January 17, 1914, by virtue of which alone the defendant could have been convicted is unconstitutional, and the instruction requested as to the insufficiency of the evidence should have been given, the motion for dismissal (pages 14 and 15, Transcript of Record) should have been granted, and that the Court, therefore, erred in pronouncing sentence against the defendants.

Argument.

I.

ERROR OF THE COURT IN DENYING MOTIONS FOR CONTINUANCE.

In support of our contention under this head we call the attention of the Court to the case of *United States v. Ford*, 9 Otto. 594, 24 L. Ed. 399.

That case, we submit, is authority for the proposition that in a case like the present, where the testimony shows without any contradiction whatsoever, that the promise was made to the defendant by a high and responsible officer of the Government, and that the Government had no intention of keeping the promise, the Court should grant a continuance of the trial of the cause in order to afford the defendant an opportunity of making an appli-

cation to the President for executive clemency. It is no answer to this position to say as Mr. O'Connor, the Assistant U. S. Attorney, said in the Court below (page 44, Transcript of Record) that "the defendant has had six months in which to make his application to the President, if such an application could be made and he has failed to do so". Mr. Morganstern furnished the answer to that argument in his answer to a question by the Court (page 44, Transcript of Record; also bottom page 42, top page 43, Transcript of Record). Equally so, it would not be a sufficient answer to our position, that the application could be made since the date of the trial, and up to the present. It is hardly likely that the President of the United States would take action in the matter while a writ of error was pending to this Court. The time to have permitted the action, and to have granted the continuance for the purpose of permitting the action, was at the time of the application for a continuance of the trial in the Court below, or at any rate, at the time of the application for a continuance of the sentence, after the defendant's conviction. As we have before remarked, it is very significant that there is not a word of contradiction in the record of the affidavits made by the defendants or of the sworn testimony given by their counsel. Mr. Burch, the United States Commissioner, who was probably not specially interested in the matter, has only a hazy and fragmentary recollection of what happened, while Mr. Elliott,

the Collector, who was the one man most directly and vitally concerned, and who could have settled the matter positively so that there would have been no possible chance for misunderstanding, was not even called as a witness. We ask the Court to presume that if he had been called his testimony would have agreed with that of Mr. Morganstern, Mr. Gladstone and Mr. Friedlander. In any event, this is not a case where there was a conflict of testimony, and where the discretion of the Court could be exercised either way. It is a case in which the testimony is all one way, and under the Ford case we submit that the discretion should have been exercised in favor of granting the continuance. To the same general effect as the Ford case, see

Ex parte Wells, 18 Howard 307; 15 L. Ed. 421;

United States v. Wilson, 7 Peters 150; 8 L. Ed. 640;

United States v. Lee, 4 McLean 103;

People v. Whipple, 9 Cow. 707.

A reading of these cases will demonstrate that while an agreement of the character made on behalf of Gladstone is one which cannot be enforced in the Courts, it has been the policy of the law, which has endured for a century, that in such cases it is the duty of the Court to postpone the trial until the executive shall have acted in the premises. The same arguments used as to the duty of the Court to postpone the trial will apply with equal

force to the motion made by counsel for plaintiff in error (pages 85 and 86, Transcript of Record) for a continuance of the time of passing sentence upon him to a later date sufficient in time to permit him to have his application for executive clemency passed upon by the President of the United States.

II.

ERROR OF THE COURT IN PERMITTING A QUESTION OF A WITNESS FOR THE PROSECUTION AS TO A CONVERSATION HAD WITH PLAINTIFF IN ERROR AND HIS CODEFENDANT BEFORE THE CORPUS DELICTI HAD BEEN ESTABLISHED.

The testimony in question, together with the objection, is found on pages 53 and 54, Transcript of Record. It is ordinarily quite true that the order of proof is a matter which is within the discretion of the Court, but the objection raised in this case, to this question, and to other questions along the same line becomes of considerable importance in view of the fact that the *corpus delicti*, which was the unlawful possession of unlawfully imported opium, was never proved at all.

Under the head of the next assignment of error we shall discuss at more length the evidence upon this point, and we shall contend that there was no evidence whatever upon this vital point except such as was supplied by Section 3 of the Act of January 17, 1914, which we shall contend is unconstitutional.

The counsel for the defendant in the Court below saved an exception not only to this question, but to all other questions along the same line (page 54, Transcript of Record). The testimony of the witness Thomas L. Rynning (Transcript of Record, pages 53 to 58) shows that neither of the defendants had any keys which would open the packages containing the opium, and it does not appear that any keys were found upon them. In fact, it appears (page 57, Transcript of Record) that as soon as the plaintiff in error and his codefendant had fully understood what was asked of them they stated that the packages were not theirs, and no keys were found upon their persons and the packages were broken open at the county jail. This witness tried every key that Gladstone had in his pocket but they did not fit the grips. They were searched for arms and no arms were found.

The witness Fullerton, who admits (page 77, Transcript of Record) that he had been convicted of felonies at least twice, was arrested and immediately released under the orders of Mr. Evans, a Deputy Collector (page 57, Transcript of Record). Another man George, who was driving the car, was not even searched for keys or arms and was never placed under arrest (Transcript of Record, pages 57 to 58). George was not called as a witness on the trial, and no reason was given why he was not.

The second witness for the Government, William Landis (pages 58 to 62, Transcript of Record), testified that his remarks were addressed to Frank-

lin, or Friedlander, the codefendant of Gladstone, the present plaintiff in error (page 58, Transcript of Record). When they were asked for the keys the following took place (page 59, Transcript of Record) :

“I asked him where the keys were. He says, ‘I haven’t any keys.’ I said, ‘Where is the keys so that we can open them?’ He says, ‘I don’t know; they don’t belong to us.’ Vines said that; then the under-sheriff says, ‘Well, we will bust them open,’ and Vines says, ‘Well, I don’t care, they are not ours.’ ‘Well,’ he said, ‘you just stated they belonged to you, several times.’ ‘Well, they are not ours,’ he says. * * * the first words I remember Vines saying was when we asked him for the keys.”

At this time (page 60, Transcript of Record) counsel for the defendant again renewed the objection which is the subject of this assignment. The witness continued (page 60, Transcript of Record) stating that Vines, the plaintiff in error, in answer to a question as to what was in the suit cases, said that he did not know.

Stress will no doubt be laid upon the statement that the grips “belong to us”. When it is considered that there were four persons in the party, that the only two persons arrested denied any personal ownership of the grips, denied any knowledge of their contents; that no keys to fit the grips were found upon the persons of either of them, and that one witness was never searched, was never arrested, and has disappeared, it will be seen that the evidence of ownership or guilty knowledge on

the part of Gladstone is so negligible that it should not be permitted to go to a jury and that the objection of counsel to the testimony in question should have been sustained.

The next witness, Horace U. Kennedy (pages 63 and 64, Transcript of Record) simply states that plaintiff in error and his codefendant registered in a hotel in San Diego December 21, and that after they had registered the two grips in evidence were brought in from the stage office. It does not appear that either of these men brought them in, that they had any conversation about them, or that they made any claims to them.

The next witness, D. J. Davidson (Transcript of Record, pages 65 to 68) says nothing about baggage at all, but the mysterious Mr. George who disappeared and Mr. Fullerton who was released are found at a hotel at El Centro, with a suite of rooms, and Davidson never saw them again. George engaged the rooms.

The testimony of the next witness, Belle M. Riggle, throws no light upon the matter in question.

The testimony of Earl R. Fullerton, the last witness called for the Government, is found on pages 68 to 77 of the Transcript of Record. He testified that although he owned the car in which the trip was made (page 71, Transcript of Record) the mysterious Mr. George, who is missing, drove the car upon the journey (Transcript of Record, page 69). This witness says that at the Castle Ray

Hotel Gladstone and Friedlander each came out with a grip in his hand (page 73 also page 75, Transcript of Record). He denied that he had testified at the preliminary examination that he did not know who brought them out of the hotel; that when he first saw them they were on the sidewalk with the two men, and that he helped to lift them into the automobile.

The witness William Carse, a Deputy United States Marshal, called on behalf of the defendants, flatly contradicts this testimony (page 77, Transcript of Record) and this witness is therefore thoroughly discredited in a very important part of his testimony. This circumstance, together with the fact that this witness, admittedly a convicted felon, and therefore incompetent to be a witness, was also on this journey with the absent Mr. George, and was never arrested and never searched, and the other fact that no keys to fit these suit cases were found upon the person of either of these defendants, shows that the evidence of the *corpus delicti* was entirely absent, and that the action of the Court in permitting the line of questions objected to was not only error but was highly prejudicial to the plaintiff in error.

The codefendant, Morris Friedlander (pages 78 to 85, Transcript of Record) denies that he ever touched the suit cases, and did not see the plaintiff in error, Vines or Gladstone, handle them either. The only person whose testimony even hints at

such a thing is that of Fullerton who has been thoroughly discredited.

For these reasons we submit that the action of the Court above noted was error prejudicial to the plaintiff in error.

III.

THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY A CONVICTION. SECTION 3 OF THE ACT OF JANUARY 17, 1914, WHICH ATTEMPTS TO SUPPLY THE DEFECT IN PROOF IS UNCONSTITUTIONAL AND THE CAUSE SHOULD HAVE BEEN TAKEN FROM THE JURY ON THE MOTION OF THE DEFENDANT.

We desire to urge this last point very earnestly upon the consideration of the Court.

The indorsement upon the back of the indictment (page 7, Transcript of Record) shows it to be "An indictment for Viol. Sec. 2, Act Jan. 17, 1914. Having in Possession, Receiving, etc., Smuggled Smoking Opium". The Act of January 17, 1914, is an amendment of the Act entitled "An Act to Prohibit the Importation and Use of Opium for other than medicinal purposes", approved February 9, 1909, 35 Stat. L. 614. The Amendatory Act is found in 38 Stat. L., page 275. The Act of February 9, 1909, contained two sections. By the first it was enacted that after April 1, 1909, it should be unlawful to import into the United States opium in any form, or any preparation or derivative thereof, with the proviso added that opium and

preparations and derivatives thereof, other than smoking opium, or opium prepared for smoking could be imported for medicinal purposes only under regulations of the Secretary of the Treasury, and subject to duties imposed by law. Section 1 was unchanged by the amending Act of January 17, 1914.

Section 2 of the Act of February 9, 1909, provided:

“(PENALTY FOR VIOLATION—POSSESSION, PROOF OF GUILT.) That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or by imprisonment for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury.”

This section likewise is retained in exact words in the amending Act of 1914.

Under the Act of 1909, in order to secure a conviction against a defendant, the Government was

required to show to a moral certainty and beyond all reasonable doubt, that the defendant had possession of opium which had been imported after April 1, 1909, and if that was shown to be the case that evidence was declared to be sufficient to authorize his conviction unless he should explain to the satisfaction of the jury the fact of his possession of such unlawfully imported opium.

Several other sections were added to the original Act by the Act of January 17, 1914. Among these was Section 3 which reads as follows:

“(PRESUMPTION—BURDEN OF PROOF.) That on and after July first, nineteen hundred and thirteen, all smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine, and the burden of proof shall be on the claimant or the accused to rebut such presumption.”

A reference to the testimony contained in the transcript of record will show conclusively (pages 53 to 85 inclusive, Transcript of Record) that there is absolutely no evidence tending even in the remotest degree to establish the fact that this defendant had in his possession, received, concealed, transported, or facilitated the transportation or concealment of any opium which had been imported into the United States either subsequent to April 1, 1909, or at any other time or at all. In other words, there is an absolute failure to prove that the opium which is the subject of the testimony was

ever imported into the United States at all. We think that it must be conceded, in view of the language of Section 2 of the Act of 1914, that there could have been no conviction in this case except by virtue of the "presumption" which is attempted to be fastened upon the defendant by the language of Section 3. Our contention is, in brief, that Section 3, containing, as it does, not merely a presumption, but a presumption based upon another presumption, is a violation of the 5th Amendment of the Federal Constitution in that it deprives the defendant of his liberty without due process of law.

Our contention as to the unconstitutional character of Section 3 of the Act of 1914 can be readily understood by considering its effect upon a person charged with a violation of this Act. Let us take the case of the present defendant. He was arrested at a place called Spring Valley (page 53, Transcript of Record). The location of Spring Valley is not definitely given in the testimony, but it appears from the testimony of Wm. Landis (page 58, Transcript of Record) that he was the Deputy Sheriff of San Diego County, and it might be inferred that the place was somewhere near San Diego.

In an automobile in which this defendant was riding, together with his codefendant Morris Friedlander, and at least two other men, one Earl R. Fullerton and one George (page 53 and page 58,

Transcript of Record), were found a suit case and a black box to which neither of the defendants had any keys, and therein were found some cans of opium prepared for smoking.

The man "George" was not produced as a witness on the trial, and so far as anything is shown by the record there is as much evidence that he was the owner of these receptacles as there was that they were owned by Gladstone or Friedlander. It cannot, therefore, be said, in the first place, that there was any satisfactory evidence, or any evidence which ought to have been permitted to go to the jury, that this opium was in the possession of the defendant Gladstone. But, assuming for the sake of argument only, that the jury would have been justified in finding that the opium in question was in Gladstone's possession, it next became necessary, in order that the Government should prevail, for the District Attorney to prove that this opium had been imported into the United States contrary to law. A glance at the provisions of Sections 1 and 2 of the Act will make this clear. Section 1 forbids the importation into the United States of opium in any form or preparation or derivative thereof, with certain exceptions. Section 2 provides that if any person shall fraudulently or knowingly import or bring into the United States or assist in so doing, any opium or any preparation or derivative thereof, contrary to law, or shall receive, conceal, buy, sell or in any manner facilitate the transportation, concealment or sale of

such opium or preparation or derivative thereof *after importation*, knowing the same to have been imported contrary to law, *such opium* or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be punished in the manner prescribed. Then follows this provision:

“Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of *such opium* or preparation or derivative thereof, *such possession* shall be deemed sufficient evidence to authorize conviction, unless the defendant shall explain *the possession* to the satisfaction of the jury.”

The defendant then must be shown to have or to have had possession of *such opium*, meaning opium which had been fraudulently or knowingly imported or brought into the United States contrary to law. Thus far the presumption is a reasonable one, and the constitutionality of this section has been upheld by the Courts. But Section 3 builds another presumption on top of this one, and a defendant is told, in effect, that if at any time after July 1, 1913, he is found with any opium in his possession, the Government is not only not required to prove that he assisted in importing it contrary to law, but the Government need not even prove that the opium ever came into this country at all; that from the mere fact that opium, the origin of which is unknown, is found in his possession, it is presumed, in the first place, that it was imported

contrary to law, and second, that he assisted in importing it.

We do not deny the proposition that it is ordinarily within the limitations of legislative power to prescribe the rules of evidence which are to be observed in Courts of justice, to establish presumptions and to state what shall constitute *prima facie* evidence in certain cases. In the case of Section 2 of the Act of 1914, identical in terms with Section 2 of the Act of 1909, this power has been exercised. Another example is found in Section 3082 of the Revised Statutes of the United States which denounces generally the offense of unlawfully importing or bringing merchandise into the United States contrary to law, and receiving, concealing, buying, selling, etc., such merchandise after importation. This section has been upon the statute books of the United States for many years, the original having been passed March 2, 1799, and another one July 18, 1866. It will be seen that the language of Section 3082 is identical with that of Section 2 of the Act in question substituting the word "merchandise" for "opium". But while the law making power has the right to authorize the drawing of inferences from facts, the cases are uniform to the effect that there must be a rational connection between the fact proved and the fact authorized to be inferred therefrom. If a person is found in possession of merchandise, whether it be a silk handkerchief or opium, which has been imported into this country contrary to law, he is

not deprived of his constitutional right to due process of law because Congress has seen fit to say that such evidence is sufficient to authorize his conviction unless he explain the possession to the satisfaction of the jury. The reason is, that there is some rational connection between the possession by a person of goods which have been unlawfully brought into the country, and knowledge of their unlawful entry on his part, and transportation and concealment thereof with such knowledge. But where Congress undertakes to say that on and after a certain arbitrary date, July 1, 1913, *all smoking opium or opium prepared for smoking found within the United States* shall be presumed to have been imported after the first day of April, 1909, and where Congress further places the burden of proof on the accused, to rebut that presumption, we most respectfully but earnestly contend that there is no rational connection between the fact, namely, the presence of smoking opium in the United States, and the conclusion to be inferred from it, or the inference to be drawn from it, that it was imported into this country contrary to law, or that it was imported at all. We insist that it is not competent for Congress to enact, that on finding a can of opium in a man's possession, it shall be presumed (1) that the opium was imported into the United States and was not produced here, (2) that it was imported contrary to law, (3) that the defendant knew these facts, and (4) that he

received and concealed the opium with such knowledge.

There is one case, *United States v. Yee Fing*, 222 Fed. 154, decided by the United States District Court for the District of Montana, which holds adversely to our contention. With all due respect to the learning of the Judge who presides over that Court, we earnestly insist that the reasoning whereon the decision is based is unsound, and we ask this Court not to follow it. The learned Judge begins his discussion, after referring to the Acts of February 9, 1909, and January 17, 1914, by saying (pages 155-156):

“These statutes provide for presumptions or prima facie proof of the offense, which, while sufficient to sustain a verdict of guilty, may or may not be sufficient to satisfy the jury of the guilt of the accused beyond a reasonable doubt. They are but what are commonly styled rules of evidence and not substantive law creating offenses, and do not deprive the jury of its function of weighing evidence and determining facts. Though the accused presents no evidence, the circumstances inevitably appearing in the prosecution’s evidence, may often be such that the jury will and should refuse to draw the inferences these statutes authorize, but do not and probably could not command, in that it is not satisfied they should be drawn—not convinced that the accused is guilty beyond a reasonable doubt.”

As we have before remarked, it is undoubtedly the law that Congress has a right to direct inferences to be drawn from facts provided there is a rational connection between the facts proved and

the inferences drawn therefrom, that the inferences are not so unreasonable as to be mere arbitrary mandates, and that the party affected is free to oppose them. Indeed the Court in the Yee Fing case states this rule on page 156.

We submit that it is not enough to say that the jury may not wish to draw this inference. The answer is that the Act of Congress authorizes them to draw it. It is a fundamental right of a defendant to remain silent, and to require the prosecution to prove every fact and every element to establish his guilt to a moral certainty and beyond all reasonable doubt. It is also fundamental that every defendant without exception is presumed to be innocent until his guilt is established to a moral certainty and beyond all reasonable doubt. It is true that this moral certainty may be arrived at by a jury by circumstances, and that inferences may be drawn by them from facts established, but only, as the learned Judge in the Yee Fing case admits, when there is some rational connection between the facts proved and the facts inferred therefrom, and where the inferences are not so unreasonable as to be mere arbitrary mandates. We submit that there is no more connection between the possession of a can of smoking opium and the importation thereof, lawfully or unlawfully, from a foreign country, than there would be between the possession of a silk handkerchief of Chinese workmanship, and the unlawful importation of such handkerchief from China. Opium of all kinds is

not forbidden to be imported, and it is within the judicial knowledge of the Court, as a matter of science, that prepared smoking opium can be and is manufactured from crude opium or gum opium; that there is no necessary reason why this process of manufacture must have taken place in a foreign country rather than on American soil, and that, therefore, there is no logical connection between the possession of smoking opium, and the inference sought to be drawn that it was unlawfully imported and the defendant knew it.

The Court in the Yee Fing case makes the admission (page 156) that

“the presumptions here involved, though beyond any in revenue laws or elsewhere brought to the attention of the court, appear to come within the limits of the legislative power”.

We respectfully submit that a consideration of the matter will show that they do not. Section 3082 of the Revised Statutes, containing the same provision as is found in Section 2 of the Act in question, goes as far as the legislative power had any right to go in establishing a presumption in a case like this; and the fact that that section has remained unchanged upon the statute books for many years and has apparently been found sufficient to remedy the evil which was aimed at thereby, is ample evidence of the fact that some doubt has existed as to the right of Congress to go further. It will probably be answered, in reply to this argument, that it is a difficult thing for the

Government to show that the particular can or number of cans of opium, found in a man's possession, were unlawfully imported into the United States, and that, therefore, Congress was justified in adding the presumption contained in Section 3 for the laudable purpose of suppressing the injurious traffic in opium. The answer to this contention is (1) that no man can be deprived of his constitutional right to life, liberty or property by any means which do not constitute due process of law, no matter what the evil which is to be remedied; (2) that in a criminal case the greatest presumption in favor of a defendant is that of innocence, and that the practical benefit of that presumption cannot be taken away from him by placing upon him burdens which he ought not to be made to assume, and which he very probably could not assume; (3) that there is no rational basis for the indulgence of the presumption enumerated in Section 3, because there is no reason why prepared smoking opium should be presumed to have been imported from abroad rather than to have been manufactured here.

The learned Court in the Yee Fing case seeks (page 156) to dispose of this last point by saying "The Court takes judicial notice that opium is not commercially a domestic product". We have been unable to find any basis in the authorities for this statement of the Court. Judicial notice is taken of facts which are so general and so notorious and of so public a character that, as they are

generally known, the Courts also should be presumed to know them. We submit that there is nothing in any of the decisions, so far as we have examined them, which would authorize the Court to judicially know whether opium is or is not commercially a domestic product. There is nothing in the nature of the soil of this country which would prevent the raising here of the poppy plant from which opium is derived, and we submit that there is no reason why the process necessary for its manufacture could not be as readily carried on in this country as elsewhere. In any event, we believe that the knowledge assumed to be within the judicial knowledge of the Court that opium is not "commercially" a domestic product is too slender a foundation upon which to base or build this presumption based upon a presumption, which is "beyond any in revenue laws or elsewhere brought to the attention of the Court". There ought to be no more practical difficulty in proving, under Section 2 of the Act in question, that the opium found in a defendant's possession was unlawfully imported into the United States, than there would be in proving, under Section 3082 of the Revised Statutes, that a dozen silk handkerchiefs found in a defendant's possession had been unlawfully imported into the United States.

In the case of *In re Wong Hane*, 108 Cal. 680, the Supreme Court of California held that an ordinance making it "unlawful for any person to have in his possession, unless it be shown that such

possession is innocent any lottery ticket" is unconstitutional in that it places on one accused of its violation the burden of showing the innocence of his possession.

In the case of *State v. Hirsch*, 45 Mo. 429, the Court held that on the trial of an indictment under the statute of Missouri prohibiting the sale of goods, wares and merchandise, not the growth, produce or manufacture of the State, by peddlers without a license, the burden of proof is on the prosecution to show that the goods sold were not the growth, produce or manufacture of the State.

One presumption cannot be founded upon another. The only presumptions of fact which the law recognizes are immediate inferences from the facts proved.

Looney v. Metropolitan R. Co., 200 U. S. 480, 488; 50 L. Ed. 564;

United States v. Ross, 92 U. S. 281, 283; 23 L. Ed. 707.

In the Ross case the Court uses the following language:

"They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed" (92 U. S. 281, 283; 23 L. Ed. 707).

And again, on page 284 of the Ross case, the Court uses the following:

“A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption.”

See also *Manning v. Insurance Co.*, 100 U. S. 693, 697; 25 L. Ed. 761, and cases there cited.

For the above reasons, therefore, we respectfully contend that there was no evidence sufficient to authorize the jury to find that the defendant Gladstone had possession of the opium involved in this case. That even granting for the sake of this argument only that there was evidence sufficient to go to the jury, there was no evidence that the opium in question was either unlawfully imported into the United States, or imported at all, outside of the presumption attempted to be drawn under the authority of Section 3 of the Act of January 17, 1914, that this section of the Act is unconstitutional in that it places upon the shoulders of a defendant in a criminal case the burden which he could not in most instances carry, and that it therefore deprives him of his liberty and property without due process of law in violation of the 5th Amendment of the Federal Constitution.

It follows, therefore, that the action should have been dismissed upon the motion of the counsel of plaintiff in error (pages 14 and 15, Transcript of

Record) and that the Court should have advised the jury that the evidence was insufficient to sustain a conviction.

For the foregoing reasons we respectfully submit that the judgment of the Court below in the above entitled action should be reversed and a new trial granted to the plaintiff in error, Alexander Gladstone.

Respectfully submitted,

BENJAMIN L. MCKINLEY,

A. J. MORGANSTERN,

Attorneys for Plaintiff in Error.

No. 3017.

United States
Circuit Court of Appeals,⁶
FOR THE NINTH CIRCUIT.

Alexander Gladstone, alias Wil-
liam Vines,

Plaintiff in Error,

vs.

The United States of America,

Defendant in Error.

FILED
OCT 29 1917

BRIEF FOR DEFENDANT IN ERROR.

ROBERT O'CONNOR,

United States Attorney;

CLYDE R. MOODY,

Assistant U. S. Attorney,

Attorneys for Defendant in Error.

No. 3017.

United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Alexander Gladstone, alias Wil-
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Plaintiff in Error,

vs.

The United States of America,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Since this case was set before this court an opinion has been rendered by this court which we believe to be determinative of the only substantial point raised in the brief of counsel for plaintiff in error. On page 21 *et seq.* of the brief of plaintiff in error, under the heading III, appears an argument based upon the hypothesis that section 3 of the Act of January 17, 1914, is unconstitutional and that by reason of the unconstitutionality of this section the evidence pro-

duced on behalf of the Government before the lower court was insufficient to sustain the verdict of the jury and the judgment of the lower court. On October 1, 1917, there was rendered an opinion by this court in the case of Ng Choy Fong, plaintiff in error, v. United States of America, defendant in error, No. 2864, Judge Hunt rendering the opinion, in which the validity of section 3 was upheld. Therefore the entire argument of counsel upon this point may be disregarded in our answering brief. There therefore remains to be discussed points I and II only as argued in brief of plaintiff in error, page 13 *et seq.*

ARGUMENT.

I.

The argument of counsel for plaintiff in error under this number is based upon the order of the court denying plaintiff in error a continuance from the date set for trial before the lower court, in order that the plaintiff in error might apply to the President of the United States for a pardon. The indictment in this case was filed on the 7th day of January, 1916 (erroneously set out as January 7, 1915, on page 7 of the transcript), the plaintiff in error entered his plea of not guilty in open court on the 17th day of January, 1916, and on September 12, 1916, was placed on trial before a jury. Thus there was a lapse of approximately 8 months between the entry of the plea and the date of trial. Granting, for the sake of argument, that the President could pardon a man for a crime before he stood convicted of the same, there was ample time between the

date of the plea and the date of the trial for plaintiff in error to apply for such relief, and the record, at no place, discloses that any application for pardon was ever filed before the trial or since the trial. Such a motion as this is always within the discretion of the court to grant or refuse, and we do not believe that the action of the lower court in exercising its discretion in such a case is a proper ground for an appeal to this court.

In his brief plaintiff in error has cited some cases which he claims sustain his point that he had an inherent right to a continuance for the purpose of appealing for executive clemency. We have carefully examined all of the cases cited in the brief of plaintiff in error, and find none that is comparable to the case at bar. In all of the reported cases which we have been able to find, including those cited by plaintiff in error, the defendant who was applying for a continuance on the ground that he intended to apply for executive clemency, had acted as a witness in a case in which he was one of a number of defendants, and by so acting as a witness an equitable contract arose between him and the Government that he would not be prosecuted, and the courts have uniformly given sufficient time for an appeal for executive clemency in such cases. However, in the case at bar no such situation arises. No one connected with the Department of Justice of the United States has made any promises whatever to this plaintiff in error. He sets up that one John B. Elliott, Collector of Customs at Los Angeles, promised to intercede in his behalf providing he would

disclose where he obtained the opium and all of the circumstances surrounding his possession of it. He further claims that he was promised that nothing he should say would be used against him in further proceedings which might be had against him, and also claims that he understood that he was to be given immunity by reason of the disclosures aforesaid.

If we take the affidavit of plaintiff in error as absolutely true, he still has no contract with the Department of Justice, because John B. Elliott had no authority to make such a contract. The case of *United States v. Ford et al.*, 9 Otto 594, cited in the brief of plaintiff in error, page 13 *et seq.*, holds that even the United States Attorney has no right to make such a contract, therefore much less would some outside party have the right to make such promises. The plaintiff in error was never called upon to testify against any one in this or any other case concerning the matters which he is supposed to have revealed to John B. Elliott, therefore he is not in the same position as would be a defendant who had so testified and by such testimony admitted his guilt in the consummation of a crime. The United States Attorney and the Department of Justice cannot be held responsible for what outside parties may say to the defendant or what representations or what promises may be made without the sanction of the United States Attorney. To be sure, a confession extorted under such conditions could not be used in the trial against the defendant, but the confession of the plaintiff in error was not used against him in the trial of this case, but he was con-

victed entirely upon other testimony. The only place that the United States Attorney's name is mentioned in any of these conversations is on page 43 of the transcript, where Mr. Morganstern stated at one time Mr. Schoonover was present at a conference, but at no place is it alleged that Mr. Schoonover, the United States Attorney, made any promises or representations whatsoever in this matter.

That there is nothing to this assignment of error is further substantiated by the fact that no application for executive clemency was made prior to the trial and executive clemency has not been granted since the trial, although this trial was held more than one year ago.

II.

The argument of plaintiff in error on this point, page 16 *et seq.* of his brief, is to the effect that a conversation in which the defendant took part was admitted in evidence prior to the proving of the *corpus delicti*. This was not the case, but if it had been the case, and the *corpus delicti* were subsequently proved, there would have been no error in this record. In this character of case the *corpus delicti* is the possession of smoking opium. Therefore, since the law makes unlawful the possession of smoking opium or its presence in the United States, whenever smoking opium is found in the United States the presumption immediately arises that a crime has been committed, and it is then competent to connect any person with such crime by his own statements. In this case the presence of the two suit

cases, which contained the opium, in the automobile with the plaintiff in error was conclusively shown before any conversation was admitted, and while the opium had not at that time been discovered in the suit cases, nor had it been examined by an expert, nevertheless the fact remains that it was present, and any conversation concerning the container of the same was entirely competent. It was all part of one transaction, and the part introduced in evidence first was wholly within the discretion of the lower court.

That the testimony set up in the transcript is ample to sustain the conviction, the most casual reading will reveal. This defendant did not take the witness stand in his own defense, and therefore the possession shown by the witnesses for the Government was absolutely unexplained. The suit cases were shown to have been in the possession of this plaintiff in error prior to his going to Imperial Valley, on the return trip from which place he was arrested. His use of a fictitious name, the peculiar actions surrounding his trip, the prior possession of the suit cases, and his statements immediately upon being arrested by the officers, all point to guilty knowledge; so that we have no hesitancy in saying that we do not believe this court will question the sufficiency of the evidence.

We would finally call the court's attention to the anomalous position of this plaintiff in error, in that on the one hand he claims the right to executive clemency because of the revelations he made to John B. Elliott, Collector of Customs, the inference from which is so strong that we must assume that such revelations

showed conclusively his guilt of the crime charged, and on the other hand seeks to have this court set aside the verdict of the jury and judgment of the lower court upon the ground that the evidence is insufficient.

Respectfully submitted,

ROBERT O'CONNOR,

United States Attorney;

CLYDE R. MOODY,

Assistant U. S. Attorney,

Attorneys for Defendant in Error.

No. 3017

IN THE

United States Circuit Court of Appeals ₇

For the Ninth Circuit

ALEXANDER GLADSTONE, alias William Vines,
Plaintiff in Error,
VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

PETITION OF PLAINTIFF IN ERROR FOR A REHEARING.

Upon Writ of Error to the United States District Court of the
Southern District of California, Southern Division.

BENJAMIN L. MCKINLEY,
Humboldt Bank Building, San Francisco,
*Attorney for Plaintiff in Error
and Petitioner.*

No. 3017

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALEXANDER GLADSTONE, alias William Vines,
Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

PETITION OF PLAINTIFF IN ERROR FOR A REHEARING.

Upon Writ of Error to the United States District Court of the
Southern District of California, Southern Division.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

Now comes Alexander Gladstone, the plaintiff
in error in the above entitled cause, and respect-
fully petitions your Honorable Court for a rehear-
ing in the above entitled cause for the following
reasons:

I.

In deciding adversely upon the first assignment
of error of plaintiff in error, namely, that the

Court erred in denying motion for a continuance of the trial for the purpose of submitting to the President of the United States an application for executive clemency on behalf of plaintiff in error, the Court seem to take the view, in the first place, that the evidence adduced upon the trial shows that plaintiff in error was the principal offender, and that therefore his full disclosure to the Collector of Customs at Los Angeles of all the facts within his knowledge concerning the opium which was in question in this case, did not give him an equitable right to clemency. We most respectfully submit that in our humble judgment the evidence ought not to be given this construction.

It appears (page 53 and page 56, Transcript of Record) that besides Gladstone and his co-defendant, Friedlander, there were two other men in the automobile with them. It further appears that neither Gladstone nor Friedlander had any keys either to the suit case or to the black box containing the opium, which were found in the automobile (page 54, Transcript of Record). One of the other two men, named "George," was the driver of the machine (page 56, Transcript of Record). When the question was asked by the Deputy Sheriff, "Where are the grips?" it was George who answered his question (page 56, Transcript of Record). The witness Rynning, the Deputy Sheriff, testified (page 57, Transcript of Record) that he tried every key in the pocket of Gladstone or Vines, and they did not fit the grips. He also searched Fullerton, but did not search George at

all (page 57, Transcript of Record). George was not produced as a witness on the trial and no reason was given for his failure to appear. Fullerton was the owner of the car (page 71, Transcript of Record), but George drove it. In view of these facts, and in view of the further fact that Fullerton admits (page 7, Transcript of Record) that he had been convicted of a felony in this state, and also prior to coming to this state, which would render him incompetent to be a witness, we respectfully submit to the Court that we do not believe it can be correctly said that the evidence in the Court below discloses that Gladstone himself was the principal offender. We submit, in all sincerity, that the testimony, together with the fact of Mr. George's unexplained absence, tends just as strongly to show that he was guilty of the offense charged against Gladstone as it tends to show Gladstone's guilt; and that there was just as much reason for the arrest and trial of Mr. Fullerton upon this charge as there was for the arrest and trial of Mr. Gladstone. The fact that the statement made by Gladstone was not placed in the record or used against him, we most respectfully submit, could not alter the situation. The uncontradicted testimony shows that the statement was given in good faith; it is not denied that it is a full one, and it is not denied that it is a true one. The statement itself was in the custody of the prosecution, and not accessible to the counsel who defended Gladstone in the Court below, and there-

fore could not have been placed in the record by them.

In view of the testimony brought out at the trial, and particularly upon the points above referred to, we respectfully contend that it ought not to be assumed that the statement showed that Gladstone was himself the principal offender, and that nobody else was implicated by him. George and Fullerton, and particularly George, had many things to explain which George in particular did not attempt to explain as he did not appear as a witness, and we earnestly hope that the Court, upon rehearing may decide that the officers of the Government, having induced the plaintiff in error, Gladstone, to make a full disclosure upon a definite promise, should be required scrupulously and exactly to keep the promise which they made him, especially as he fulfilled his part of the transaction in good faith.

The Court in the opinion in this case make the point that "the plaintiff in error was given ample opportunity to apply for pardon between the date of the indictment and the trial, which occurred eight months later." In response to this suggestion, we respectfully submit that there was no reason why the defendant should make such an application previous to the calling of the case for trial. He had a right to rely upon the promise which was made him, and it was only when he knew that the promise would not be kept that he could, with any show of reason, ask the Court for time within

which to present his application to the executive authority.

II.

With reference to the second assignment of error, namely, that the Court permitted a question of a witness for the prosecution as to a conversation had with plaintiff in error and his co-defendant before the corpus delicti had been established, this Court in its opinion say that the order in which testimony shall be admitted is largely within the discretion of the trial Court, and while it may be preferable to prove the corpus delicti before offering evidence to implicate the accused, it is not error to receive evidence against the accused before the corpus delicti has been proved. We certainly do not and could not dispute the absolute correctness of this statement as a proposition of law. In fact, as we say in our brief, page 16, "it is ordinarily quite true that the order of proof is a matter which is within the discretion of the Court"; but we then continue (Brief of Plaintiff in Error, page 16) to state our position as follows: "but the objection raised in this case, to this question, and to other questions along the same line, becomes of considerable importance in view of the fact that the corpus delicti, which was the unlawful possession of unlawfully imported opium, was never proved at all." The discussion of the evidence on pages 16 to 21, and pages 21 to 36 of our brief was quite full, and it is not our inten-

tion, in this petition, to burden the Court with a repetition of what was there said. We may say, however, that the discussion of this point necessarily involves a discussion of the constitutionality of Section 3 of the Act of Congress of January 17, 1914, 38 Stat. L., page 275, for the reason that it is provided by that section

“that on and after July 1, 1913, all smoking opium or opium prepared for smoking found within the United States, shall be presumed to have been imported after the first day of April, 1909, and the burden of proof shall be on the claimant or the accused to rebut such presumption.”

Our contention is that there is no proof whatever outside of the presumption contained in this section, that the opium in question was imported into the United States at all, either from Mexico or from any other place, and the unlawful possession of unlawfully imported smoking opium was the corpus delicti which was required to be proved in this case before any testimony as to conversations or admissions could be received. Our position then, is, not that the Court might not receive evidence of conversations and declarations, in the exercise of its sound discretion, prior to the proof of the corpus delicti, but that, in a case like the present, where, as we respectfully insist, there was no proof whatever of the corpus delicti, the admission of the conversation in question was clearly error. We respectfully call attention, in this connection, to the following statement made by the Court in its opinion on page 3 of the typewritten

opinion of the Court in this case on file in the office of the Clerk:

“On the trial it was shown that the plaintiff in error, accompanied by Friedlander, went in an automobile from San Diego to El Centro, Mexico, taking with him two empty suit cases, and that on returning to California he was arrested while in possession of the suit cases which were filled with opium prepared for smoking.”

We think that the Court will agree, on reviewing the evidence, that there is not a particle of testimony to the effect that El Centro is in the Republic of Mexico, or that this automobile, or any of the parties in it, were ever out of the boundaries of the State of California. The town of El Centro is referred to on page 53, Transcript of Record by Deputy Sheriff Rynning, when he states that he received a telegram from the Sheriff at El Centro. Again on page 65, in the testimony of D. J. Davidson, he states that he was the manager of a hotel at El Centro, but nowhere states that this place is in the Republic of Mexico. The town is again mentioned on page 66 of the Transcript of Record, and again it does not appear that it is in the Republic of Mexico. It is again mentioned on page 69, Transcript of Record in the testimony of L. R. Fullerton, but its location is not given. The same is true on page 70, of the Transcript of Record and again on page 76. The co-defendant, Morris Friedlander, again mentions El Centro on pages 78, 80, 82, 83 and 84 of the Transcript of Record, and again it does not appear

that the town was outside the limits of the State of California. We presume that the Court will take judicial notice of the fact that there is a town called El Centro within the State of California, and that it is the County Seat of Imperial County in this state. Under the circumstances we feel certain that the Court will not presume that the place called El Centro, which was visited by plaintiff in error, was situated in the Republic of Mexico, and will not presume that he was out of the State of California.

III.

With reference to the third assignment of error, namely, the insufficiency of the evidence to justify a conviction and the unconstitutionality of the Act of January 17, 1914, we submit that, notwithstanding the fact that, as stated by the Court in its opinion, no request for an instructed verdict appears in the Transcript, and no exception appears to have been taken to any of the instructions or to the denial of any requested instruction, the decision of this question, namely, the constitutionality of the section in question, is necessarily involved in the second assignment of error just discussed, and we further respectfully submit that, in any event, it would be within the jurisdiction of this Court in its sound discretion under Subdivision 4 of Rule 24 to notice a plain error not assigned or specified. In this connection also we desire again

to call to the attention of the Court our discussion contained on pages 21 to 26 inclusive of the Brief of Plaintiff in Error, and in particular to the cases cited on page 34 and 35 of our Brief, in which the point is made that the presumption provided for by Section 3 of the Act of January 17, 1914, is not the ordinary presumption of fact which is an immediate inference from facts proved, and which is recognized by the law, but a presumption founded and based upon another presumption, or an inference from an inference, which the law does not permit.

An examination of the opinion of the Court in the case of *Ng Choy Fong v. United States*, 245 Fed. 305, cited in the Court's opinion in this case, will show that this last point was not called to the Court's attention and was not considered in the decision of that case. We again most earnestly and most respectfully urge it upon the attention of the Court upon this petition for rehearing.

Wherefore, your petitioner, plaintiff in error herein, respectfully prays that he be granted a rehearing in this case by this Honorable Court, and that the judgment against him be reversed.

Dated, San Francisco,
February 25, 1918.

BENJAMIN L. MCKINLEY,
*Attorney for Plaintiff in Error
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

BENJAMIN L. MCKINLEY,
*Counsel for Plaintiff in Error
and Petitioner.*

United States
Circuit Court of Appeals *6*

For the Ninth Circuit.

Apostles on Appeals.

(IN TWO VOLUMES.)

COMPAGNIE MARITIME FRANCAISE, a
French Corporation,

Appellant,

vs.

HERMANN L. E. MEYER, GEORGE H. C.
MEYER, HERMANN L. E. MEYER, JR.,
J. W. WILSON, and JOHN M. QUAILE,
Partners Under the Style of MEYER, WIL-
SON & COMPANY,

Appellees.

VOLUME I.
(Pages 1 to 256, Inclusive.)

Upon Appeals from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

Filed

United States
Circuit Court of Appeals

For the Ninth Circuit.

Apostles on Appeals.

(IN TWO VOLUMES.)

COMPAGNIE MARITIME FRANCAISE, a
French Corporation,

Appellant,

vs.

HERMANN L. E. MEYER, GEORGE H. C.
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VOLUME I.
(Pages 1 to 256, Inclusive.)

Upon Appeals from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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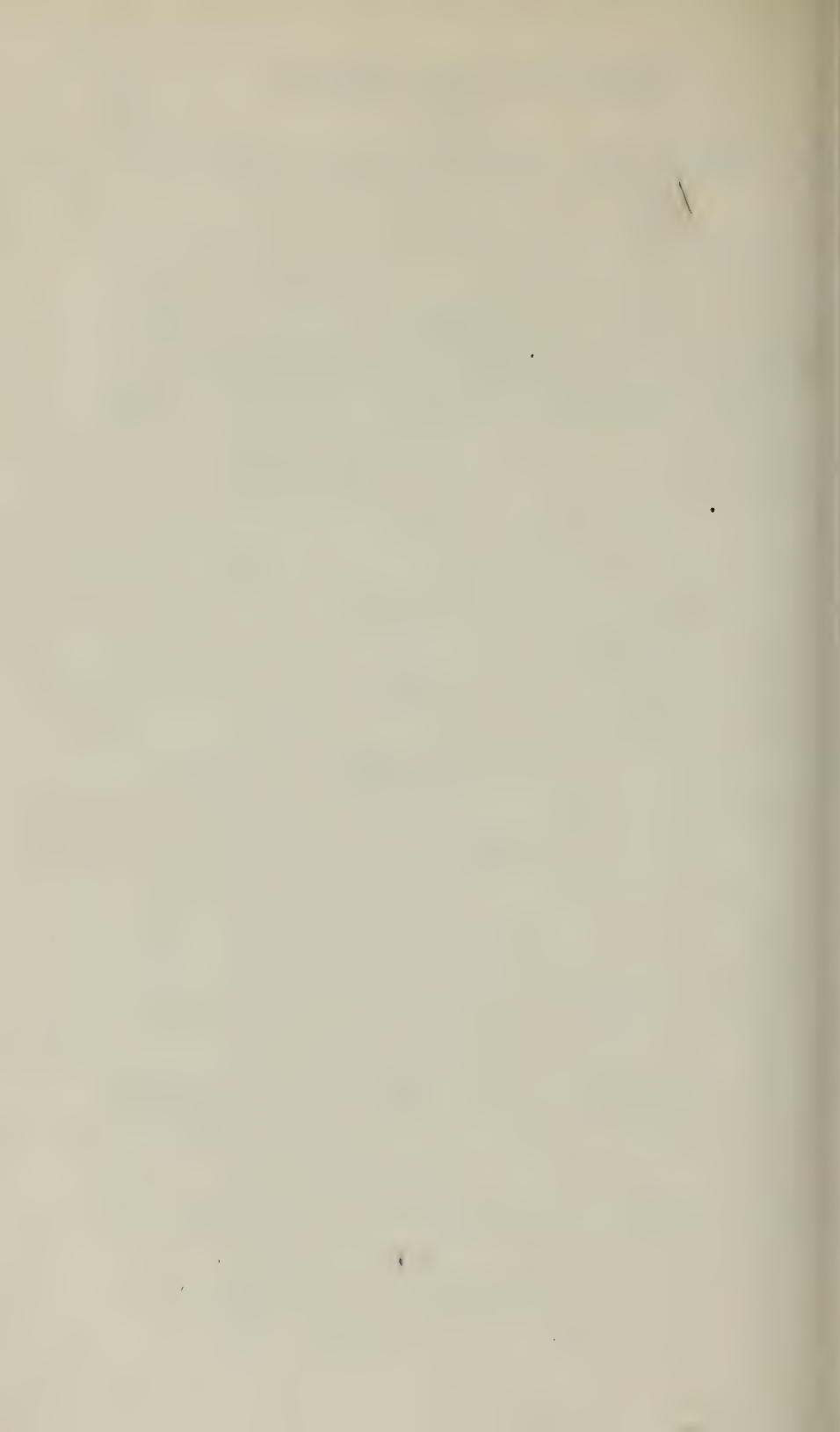
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(Title of Court and Causes, and Numbers.)

Praeceptum for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

The libelants in the above-entitled cause numbered 13,941, and the claimants in the above-entitled cause numbered 13,959, having appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the respective final decrees of this Court entered in said causes, and all parties hereto having stipulated that the records and files of the said causes may be consolidated for the purposes of preparing Apostles on Appeal in the said causes, you are hereby requested to prepare and certify the Apostles on Appeal to be filed in said Appellate Court in due course for use in both causes on appeal, said apostles on appeal to be prepared in accordance with Rule 4 of the Rules in Admiralty of said Appellate Court; and said Apostles on Appeal to include in their proper order and form the following papers and documents, to wit:

All the matters prescribed and mentioned in Admiralty Rule No. 4 of said Appellate Court.

ANDROS & HENGSTLER,
GOLDEN W. BELL,

Proctors for Libelants in Case No. 13,941, and
Claimants in Case No. 13,959.

[Endorsed]: Filed Mar. 16, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

*Page-number appearing at foot of page of original certified Apostles on Appeal.

Statement of Clerk U. S. District Court.

*In the Southern Division of the District Court of
the United States, Northern District of California,
First Division.*

No. 13,941.

COMPAGNIE MARITIME FRANCAISE (a
French Corporation),

Libelant,

vs.

The Cargo of the French Barque, "DUC
D'AUMALE,"

Respondent.

PARTIES.

Libelant: Compagnie Maritime Francaise (a French
Corporation).

Respondent: The Cargo of the French Barque "Duc
d'Aumale."

Claimant: Hermann L. E. Meyer, George H. C.
Meyer, H. L. E. Meyer, Jr., J. W. Wilson and
John M. Quaile, copartners, doing business un-
der the firm name and style of Meyer, Wilson
& Co. [2]

PROCTORS

for

Libelant: Messrs. Andros & Hengstler, San Fran-
cisco, California.

Respondent and Claimants: McCutchen, Olney &
Willard (formerly, Page, McCutchen & Knight),
San Francisco, California.

PROCEEDINGS.

1908.

November 30. Filed verified libel for freight under charter-party.

Issued monition for the attachment of the cargo of said French Barque "Duc d'Aumale," which said monition has never been returned.

Filed claim of Meyer, Wilson & Co. to cargo of French Barque "Duc d'Aumale."

Filed admiralty stipulation (bond), in the sum of \$30,000.00, for release of cargo, with Fidelity & Deposit Company of Maryland, as surety.

1909.

July 6. Filed answer of Hermann L. E. Meyer, George H. C. Meyer, Hermann L. E. Meyer, Jr., J. W. Wilson and John M. Quaile, copartners doing business under the style of Meyer, Wilson & Co., claimants of the cargo of the French Barque "Duc d'Aumale." [3]

1912.

January 18. The Court, this day, ordered that this case be consolidated with the cause entitled, "Hermann L. E. Meyer et al., Libelants, vs. French Barque 'Duc d'Aumale,' Respondent, No. 13,959," and that this case

stand submitted upon the testimony and argument in said consolidated cause. Hon. R. S. Bean, District Judge, Presiding.

- April 15. Filed opinion (Hon. R. S. Bean, Judge) in case No. 13,959, in which it was ordered that the Charterer, Meyer, Wilson & Co., recover from owners of French Barque, "Duc d'Aumale," for damage to cargo, and that the matter be referred to U. S. Commissioner to ascertain and report the amount due.

1913.

- August 18. Filed interlocutory decree in consolidated cases (filed in case No. 13,959).

1916.

- May 6. The report of U. S. Commissioner, as to amount of damage sustained by charterers, was this day presented and ordered filed (case No. 13,959).
- June 8. Filed (in case No. 13,959) exceptions to Report of U. S. Commissioner.
- July 1. The exceptions to report of U. S. Commissioner were this day argued and submitted.

1917.

- January 29. The Court (Hon. M. T. Dooling, Judge) this day made an order overruling the exceptions to the

Commissioner's report, confirming said report, and [4] ordering that a Decree be entered in favor of Meyer, Wilson & Company, for \$2,242.72 (order filed in case No. 13,959).

February 26. Filed final decree dismissing libel in this cause, and ordering that claimants recover their costs incurred herein.

March 16. Filed notice of appeal.
Filed cost bond on appeal in the sum of \$250.

April 3. Filed bond on appeal in the sum of \$1,500, staying execution, with National Surety Company, as surety thereon.

May 9. Filed assignment of errors. [5]

Statement of Clerk U. S. District Court.

*In the Southern Division of the District Court of the
United States, Northern District of California,
First Division.*

No. 13,959.

HERMANN L. E. MEYER, GEORGE H. C.
MEYER, HERMANN L. E. MEYER, Jr.,
J. W. WILSON, and JOHN M. QUAILE,
Partners Under the Style of MEYER, WIL-
SON & COMPANY,

Libelants,

vs.

The French Bark "DUC D'AUMALE," Her
Tackle, Apparel and Furniture,

Respondent.

COMPAGNIE MARITIME FRANCAISE (a
French Corporation),

Claimant.

PARTIES.

Libelant: Hermann L. E. Meyer, George H. C.
Meyer, Hermann L. E. Meyer, Jr., J. W. Wilson
and John M. Quaile, partners under the style of
Meyer, Wilson & Company.

Respondent: The French Bark "Duc d'Aumale,"
her tackle, etc.

Claimant: Compagnie Maritime Francaise, a French
Corporation. [6]

PROCTORS

for

Libelants: McCutchen, Olney & Willard (formerly Page, McCutchen & Knight), San Francisco, California.

Respondent and Claimant: Messrs. Andros & Hengstler, San Francisco, California.

PROCEEDINGS.

1908.

December 28. Filed verified libel for damage to cargo.

Issued monition for attachment of the French Barque, "Duc d'Aumale," etc., which said monition was afterwards, on the January 5th, 1909, returned and filed with return of United States Marshal endorsed thereon, as follows:

"In obedience to the within Monition, I attached the French Bark 'Duc d'Aumale' therein described, on the 28 day of December, 1908, and have given due notice to all persons claiming the same that this Court will, on the 12th day of January, 1909 (if that day be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to trial and con-

demnation thereof, should no claim be interposed for the same.

C. T. ELLIOTT,

United States Marshal.

By Geo. H. Burnham,

Chief Office Deputy.

San Francisco, Cal. Dec. 28,
1908." [7]

1908.

December 28. Filed claim of *Compagnie Maritime Francaise*, a French corporation, to the French Bark, "Duc d'Aumale," etc.

Filed admiralty stipulation (bond) in the sum of \$25,000, for the release of said French bark with Fidelity and Deposit Company of Maryland, as surety.

1909.

June

1. Filed answer of *Compagnie Maritime Francaise*, a French corporation.

2. Filed deposition of George Ledru, taken on behalf of respondent, before Francis Krull, U. S. Commissioner.

1911.

February 16. Filed depositions of E. Deddes et al., taken on behalf of libellant, before Commissioner Charles Albert van Renterghem, at Rotterdam, Holland.

Filed depositions of E. Plisson et al., taken on behalf of respondent, before Ch. Ed. Simon, doyen, at Nantes, France.

August 14. The Court this day referred this matter to United States Commissioner Jas. P. Brown to take and report the testimony.

1912.

January 15. Filed depositions of Pierre Lalande et al., taken on behalf of respondent, before Jas. P. Brown, United States Commissioner. [8]

1912.

January 16. This cause this day came on for hearing, in the District Court of the United States, for the Northern District of California, at the courtroom thereof, at San Francisco, California, before the Honorable R. S. Bean, Judge, presiding in said Court, and after hearing duly had, was continued until January 17th, 1912, for further hearing.

17. This cause came on for further hearing. Hearing and argument were had, and it was ordered that the matter be continued until January 18th for further argument. The Court ordered that Mr. Hengstler be granted one week to determine whether he will make application

to introduce further evidence herein.

18. This cause this day came on for further argument, after which the matter was ordered submitted to the Court for decision. It was ordered that the cause entitled "Compagnie Maritime Francaise vs. The Cargo of the French Barque 'Duc d'Aumale,' No. 13,941," be consolidated with this cause, and that it stand submitted upon the evidence and arguments introduced and made in this case.

February 2. This cause this day came on for further hearing, in pursuance to order of January 17th, and after hearing duly had, was resubmitted to the Court for decision. [9]

1912.

- April 15. Filed opinion (Hon. R. S. Bean, Judge, Presiding), in which it was held that Meyer, Wilson & Co., were entitled to recover for damage to cargo, and referring the matter to U. S. Commissioner to ascertain and report the amount thereof.

1913.

- August 18. Filed interlocutory decree.

1916.

- March 23. Filed commissioner's report.

Filed one volume of testimony taken for commissioner.

June 8. Filed exceptions to report of commissioner by Meyer, Wilson & Co., libelants.

July 1. A hearing was this day had on the exceptions to the report of commissioner, and after argument was ordered submitted. The Hon. M. T. Dooling, Judge, presiding.

1917.

January 29. The Court this day filed its order, overruling the exceptions to the commissioner's report, confirming said report, and ordering that a decree be entered in favor of libelants for the sum of \$2,242.72.

February 8. Filed final decree.

March 16. Filed notice of appeal.
Filed cost bond on appeal.

April 6. Filed stipulation and order staying execution until this appeal is decided.

May 9. Filed assignment of errors. [10]

(Title of Court and Cause.)

Libel for Freight Under Charter-party (13,941).

The libel of Compagnie Maritime Francaise, a French corporation, against the cargo of the French barque "Duc d'Aumale," laden on board of said vessel, and against all persons lawfully intervening

for their interest therein, in a cause of contract, civil and maritime, alleges:

FIRST.

That at all the times hereinafter mentioned libelant, *Compagnie Maritime Francaise*, was, and now is, a corporation organized and existing under the laws of the Republic of France, with its principal place of business at the city of Nantes, in said Republic, and was and is the owner of the French barque "Duc d'Aumale."

SECOND.

That on or about the 19th day of August, 1907, the said barque being then in the port of Rotterdam, Holland, the said libelant, as owner, made and concluded a charter-party with the firm of Wilson, Meyer & Co., charterers, by which said libelant, for and in consideration of the covenants and agreements therein mentioned, to be kept and performed by charterers, did covenant and agree on the freighting and chartering of the said barque unto said charterers, for a voyage from the port of Rotterdam to the port of San Francisco, in this District, on the terms in said charter-party mentioned. That a copy of said charter-party is hereunto annexed, marked Exhibit "A," and made a part hereof.

THIRD.

That, among other things, it was by said charter-party covenanted and agreed that the said charterers, for and in consideration [11] of the covenants and agreements to be kept and performed by said libelant, chartered and hired said barque on the terms following, therein mentioned, to wit:

- 1st. That the cargo was to consist of about 600 tons pig iron, balance coke (only one quality of coke to be shipped.)
- 2d. That libelant be paid Freight at the rate of twenty-two (22) shillings six (6) pence on pig iron, and at the rate of twenty-nine (29) shillings on coke, British sterling, per ton (of 20 cwt.) delivered, at the exchange of \$4.80 per pound sterling in full, to be paid in United States gold coin, on right and true delivery of the cargo.
- 3rd That charterers' liability should cease on completion of loading, and that libelant should have a lien on the cargo for all freight under said charter-party.

FOURTH.

That thereafter, at said port of Rotterdam, the said barque being then and there tight, staunch and strong, and every way fitted for the agreed voyage, said charterers shipped, and libelants received, on board of said barque a cargo of pig iron and coke, consisting of about 660 tons of pig iron, the balance being coke amounting to a number of tons in excess of 2,000 tons. That the master of said barque issued bills of lading for said cargo, wherein charterers or order were and are mentioned as consignees at the port of discharge. That thereafter the said barque set sail and proceeded to the port of San Francisco, where she arrived, with said cargo on board, on or about the 19th day of November, 1908, and was directed by charterers, as consignees, to a wharf within the Golden Gate for discharge. [12]

FIFTH.

That at all times since the making of said charter-party, libelant has well and truly performed all and singular the covenants and undertakings under said charter-party on its part to be performed.

SIXTH.

That on the discharge of said cargo, the sum of twenty-two shillings and six pence (22s. 6) became and was due and payable by charterers to libelants for each and every ton of pig iron discharged and delivered, and the sum of twenty-nine shillings (29s) for each and every ton of coke discharged and delivered, at the exchange of \$4.80 per pound sterling in full, to be paid in United States gold coin, in accordance with the terms of said charter-party. That libelant is ready and willing to deliver to charterers or order the said cargo, and the whole thereof, upon receipt of the freight agreed upon under the charter-party, but that charterers, although requested thereto, have refused to pay the sums mentioned respectively per ton of cargo delivered, and have notified libelants of their refusal to pay the sums claimed by libelant to become and be due as above mentioned under said charter-party, and have not paid to libelant the said sum or sums or any part thereof.

SEVENTH.

That libelant has been damaged by said neglect and refusal of said charterers and consignees of said cargo in a sum, the exact amount whereof cannot be determined at the present time nor until the completion of the discharge of said cargo, but which

will amount approximately to the sum of twenty thousand dollars (\$20,000).

EIGHTH.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this [13] Honorable Court, and that the said cargo above mentioned is now in the port of San Francisco and within said District.

WHEREFORE libelant prays that process of attachment in due form of law, according to the course of this Honorable Court, in causes of admiralty and maritime jurisdiction, may issue against the said cargo of the French barque "Duc d'Aumale," and that all persons having or pretending to have any right, title or interest therein may be cited to appear and answer all and singular the matters aforesaid; and that this Honorable Court will pronounce for the freight as aforesaid, with interest and costs; and that said cargo may be condemned and sold to pay the same; and that the Court will grant to libelant such other and further relief as in law and justice it may be entitled to receive.

COMPAGNIE MME. FRANCAISE,

By P. LALANDE,

Master of the French Barque "Duc d'Aumale" and
Agent for Libelant.

ANDROS & HENGSTLER,

Proctors for Libelant.

(Duly verified.) [14]

[Endorsed]: Filed, Nov. 30, 1908. Jas. P. Brown,
Clerk. By John Fouga, Deputy Clerk. [15]

(Title of Court and Cause.)

Libel (13,959).

To the Hon. JOHN J. DE HAVEN, Judge of the District Court of the United States for the Northern District of California:

The libel of Hermann L. E. Meyer, George H. C. Meyer, Hermann L. E. Meyer, Jr., J. W. Wilson and John W. Quaile, partners under the style of Meyer, Wilson & Co., doing business at the port of San Francisco, in the State of California, against the French bark "Duc d'Aumale," her tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein, in a cause of contract, civil and maritime, alleges:

I.

That at all of the times hereinafter referred to the libellants were and now are partners doing business at the port of San Francisco under the style of Meyer, Wilson & Co.

II.

That during the month of September, 1907, at the port of Rotterdam, in Holland, Wilson, Meyer & Co., merchants of Liverpool, shipped in good order and condition on board of the French sailing ship "Duc d'Aumale" about two million and fifteen thousand kilos (nineteen hundred and eighty-three tons) of coke, to be delivered in like good order and condition at San Francisco, California, unto order, the Act of God, perils of the sea and other usual perils excepted, on being paid freight according to the terms of a certain charter between said Wilson,

Meyer & Co. and the owners of said ship, to wit, twenty-nine shillings per ton, and the master of said ship [16] thereupon delivered to the said Wilson, Meyer & Co., a bill of lading for said goods, a copy whereof is hereunto annexed, marked "A" and is hereby referred to and made part hereof.

III.

That the said Wilson, Meyer & Co. thereafter endorsed and delivered to the libellants the bill of lading aforesaid, and that the libellants thereupon became entitled to receive the said merchandise from said ship in accordance with the said contract of affreightment.

IV.

That said ship sailed from said port of Rotterdam on or about September 19th, 1907, laden in part with said merchandise and thereafter, to wit, on or about the nineteenth day of November, 1908, arrived at the port of San Francisco and there delivered to the libellants the said merchandise, but these libellants aver that notwithstanding they were at all times ready and willing to pay the freight thereon as provided in said bill of lading, the same was not delivered to them in as good order and condition as when received, but, on the contrary, was injured and damaged by salt water to the extent that said merchandise on the delivery thereof was not worth in the market anything whatever after deduction of freight and duties.

V.

That the damage and injury aforesaid to the said merchandise was not caused by the Act of God or

any peril of the sea or other peril excepted in and by the said bill of lading, but solely by the negligence of the owners and master of the said ship in this, that the said ship at the time of sailing from said Rotterdam was in an unseaworthy condition [17] as to the hull thereof and was improperly stowed, so that leaks sprung in said ship and compelled the master to deviate from his voyage and seek a port of refuge and to run the said ship ashore at a point in the Falkland Islands. That long delays were incurred in attempting to float and repair said vessel, requiring the discharge of her cargo, which discharge involved great damage thereto and that the submersion thereof, as well in the ship while seeking a port of refuge, as thereafter while she was stranded, saturated the said cargo with salt water and further injured the same so that the same became and was of little value. That instead of being delivered to the libellants at the time at which said voyage would ordinarily have been ended, to wit, about the month of March 1908, provided the ship had been seaworthy on sailing, the said cargo was not delivered until the month of December, 1908.

VI.

That by reason of the negligence of the said owners and said master, and the injury to said merchandise, the libellants have been damaged in the sum of Seventeen Thousand Five Hundred (17,500) Dollars. That the owners of said ship have refused and do refuse to pay to the libellants the damages aforesaid.

VII.

That said ship is now in the port of San Francisco and within the jurisdiction of this Honorable Court.

VIII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court. [18]

And for a second and additional cause of action the libellants aver:

I.

That at all of the times hereinafter referred to the libellants were and now are partners doing business at the port of San Francisco under the style of Meyer, Wilson & Co.

II.

That during the month of September, 1907, at the port of Rotterdam, in Holland, Wilson, Meyer & Co., merchants of Liverpool, shipped in good order and condition on board of the French sailing ship "Duc d'Aumale" about four hundred (400) tons of silicious pig iron, to be delivered in like good order and conditions at San Francisco, California, unto order, the Act of God, perils of the sea and other usual perils excepted, on being paid freight according to the terms of a certain charter between said Wilson, Meyer & Co., and the owners of said ship, to wit, twenty-two shillings and six pence per ton, and the master of said ship thereupon delivered to the said Wilson, Meyer & Co., a bill of lading for said goods, a copy whereof is hereunto annexed, marked "B" and is hereby referred to and made part hereof.

III.

That the said Wilson, Meyer & Co., thereafter endorsed and delivered to the libellants the bill of lading aforesaid and that the libellants thereupon became entitled to receive the said merchandise from said ship in accordance with the said contract of affreightment.

IV.

That said ship sailed from said port of Rotterdam on or about the 19th day of September, 1907, bound to San Francisco [19] aforesaid, and laden in part with said merchandise and thereafter, to wit, on or about the 19th day of November, 1908, arrived at said port. That by reason of the insufficiency, unseaworthiness and improper stowage of said ship at the time of sailing on said voyage, said ship soon thereafter sprung a leak which at a later period of the voyage compelled the master to seek the Falkland Islands as a port of refuge, where the said vessel was beached and subsequently taken off and taken to Montevideo and thence to Buenos Ayres where she was repaired. That by reason of the delay thus incurred through the negligence of the owners of said ship, her arrival at San Francisco was delayed for a period of not less than eight months by reason whereof the libellants lost the opportunity to sell one hundred (100) tons of the said merchandise at the then prevailing price, which was in excess of the price ruling therefor in the market of San Francisco at the date of their arrival, to the damage of the libellants in the sum of One Thousand and Seventeen (1,017) Dollars.

V.

That the said owners of said ship have refused and do now refuse to pay to the libellants any part of said damage.

VI.

That said ship is now in the port of San Francisco and within the jurisdiction of this Honorable Court.

VII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

And for a third and separate cause of action the libellants aver: [20]

I.

That at all of the times hereinafter referred to the libellants were and now are partners doing business at the port of San Francisco under the style of Meyer, Wilson & Co.

II.

That during the month of September, 1907, at the port of Rotterdam, in Holland, Wilson, Meyer & Co., merchants of Liverpool, shipped in good order and condition on board of the French sailing ship "Duc d'Aumale" about two hundred and sixty (260) tons of pig iron, to be delivered in like good order and condition at San Francisco, California, unto order, the Act of God, perils of the sea and other usual perils excepted, on being paid freight according to the terms of a certain charter between said Wilson, Meyer & Co., and the owners of said ship, to wit, twenty-two shillings and six pence per ton, and the

master of said ship thereon delivered to the said Wilson, Meyer & Co., a bill of lading for said goods, a copy whereof is hereunto annexed, marked "C," and is hereby referred to and made part hereof.

III.

That the said Wilson, Meyer & Co., thereafter endorsed and delivered to the libellants the bill of lading aforesaid and that the libellants thereupon became entitled to receive the said merchandise from said ship in accordance with the said contract of affreightment.

IV.

That said ship sailed from said port of Rotterdam on or about the 19th day of September, 1907, bound to San Francisco aforesaid, and laden in part with said merchandise, and thereafter, to wit, on or about the 19th day of November, 1908, arrived at said port. That by reason of the insufficiency, [21] unseaworthiness and improper stowage of said ship at the time of sailing on said voyage, said ship soon thereafter sprung a leak which at a later period of the voyage compelled the master to seek the Falkland Islands as a port of refuge where the said vessel was beached and subsequently taken off and taken to Montevideo and thence to Buenos Ayres where she was repaired. That by reason of the delay thus incurred through the negligence of the owners of said ship, her arrival at San Francisco was delayed for a period of not less than eight months by reason whereof the libellants lost the opportunity to sell one hundred and sixty (160) tons of the said merchandise at the then prevailing price, which was in

excess of the price ruling therefor in the market of San Francisco at the date of their arrival, to the damage of the libellants in the sum of One Thousand Two Hundred and Eighty-eight and $73/100$ (1,288.-73) Dollars.

V.

That the said owners of said ship have refused and do now refuse to pay to the libellants any part of said damage.

VI.

That said ship is now in the port of San Francisco and within the jurisdiction of this Honorable Court.

VII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

And for a fourth and separate cause of action the libellants aver:

I.

That at all the times hereinafter averred they were and now are partners doing business at San Francisco, California, under the style of Meyer, Wilson & Co. [22]

II.

That during the month of September, 1907, Wilson, Meyer & Co., of Liverpool, shipped on board of said bark "Duc d'Aumale," at Rotterdam, in Holland, in good order and condition certain merchandise, to wit, coke, in the amount described in the bill of lading hereunto annexed, marked "A," and iron described in Exhibits "B" and "C" hereto annexed, reference to which is hereby made, to be by said ship

carried to San Francisco, California, and there delivered unto order in like good order and condition, the Act of God and other perils excepted as set forth in said bill of lading, on payment of freight at the rate of twenty-nine shillings per ton for the coke, and twenty-two shillings and six pence per ton for the iron.

III.

That thereafter Wilson, Meyer & Co. endorsed and delivered the said bill of lading to the libellants who now hold the same.

IV.

That after the sailing of said ship from Rotterdam aforesaid on the said voyage, she sprang a leak, so that the master thereof was compelled to seek the Falkland Islands as a refuge and there to beach his said vessel. That the said ship was thereafter floated and taken first to Montevideo and thence to Buenos Ayres where the said coke and iron were discharged, warehoused and afterwards restowed on board of said vessel. That by reason of the submersion of said coke in the hold of the said vessel during the voyage entered upon to said port of refuge and during several weeks while she lay on the beach of the Falkland Islands, the said coke was saturated with salt water to such an extent that it became of less value [23] than the cost of further transportation to San Francisco and that it became the duty of the master, acting on behalf of the libellants, who were not present or represented at said Montevideo or Buenos Ayres, to prevent the accumulation of useless charges thereon and to cause the same to be sold, but the said master,

in violation of his said duty, nevertheless proceeded to restow the said coke at great expense, said expense being enhanced by the largely increased weight thereof due to its absorption of water, while such value as said coke might have had was diminished by the additional handling thereof in the restowage thereof.

That libellants are not able to state what costs were made chargeable upon the said coke by the discharging and restowing thereof and by warehousing the same, but they aver that such charges added to the cost of freight thereon, made the said coke valueless to them at the port of destination and that it was worth less than the duties and freight. That large cost was also incurred in the handling and restowage of the iron hereinbefore referred to.

That in addition to the said charges hereinabove referred to, salvage charges were incurred in the salvage of ship and cargo which, as libellants are informed, will be sought to be enforced against libellants as consignees of said coke and iron. That delivery thereof was made at San Francisco only on condition that the libellants would, and they did, sign a general average bond whereby they agreed to pay all general average charges that might be found to be lawfully due by them on said cargo. That they are ignorant what said charges are or in what amount it may be claimed that they are liable in general average, but on their information and belief they aver that the said amount will not be less than [24] six thousand dollars. They further aver that all of said charges, if the same shall be imposed upon them, will be a loss due entirely to the neglect of the master of

said ship to properly care for the said cargo and by reason of the fact that the said ship was unseaworthy in her hull and improperly stowed at the time of departure from Rotterdam on her said voyage to San Francisco.

And the libellants further aver that said ship is now in the port of San Francisco, and that she is about to proceed on a voyage to a European port and that her owners are resident in France and that, if it be found that the libellants are liable for the charges, they will be required to pay the same, to their damage in the said sum of *Six* dollars or thereabouts.

V.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

WHEREFORE the libellants pray that process in due form of law, according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the said bark, her tackle, apparel and furniture, and that all persons having any interest therein may be cited to appear and answer on oath all and singular the matters aforesaid, and that this Honorable Court would be pleased to decree the payment of the damages aforesaid with interest and that the said vessel be condemned and sold to pay the same, and that the libellants may have such other and further relief as in law and justice

they may be entitled to receive.

GEO. H. E. MEYER,
H. L. E. MEYER,
H. L. E. MEYER, Jr.,
J. W. WILSON,
JOHN M. QUAILE,

By GEO. H. C. MEYER,
Their Attorney in Fact. [25]

PAGE, McCUTCHEN & KNIGHT,
Proctors for Libellants.

(Duly verified.) [26]

COPY.

MARKS AND/OR NUMBERS.

“A”

Freight and all conditions as per charter-party dated
19/20th August, 1907.

For immediate export, wholly or partly.

No. 3.

SHIPPED, in good order and condition, by WILSON, MEYER & CO., of Liverpool, in and upon the good Ship or Vessel, called the “DUC D’AUMAIE” whereof Lalande is Master for the present Voyage, and now lying in the port of Rotterdam, and bound for San Francisco, Cala.

Weight,
Kilos

A quantity of coke said to be two million &
fifteen thousand kilos.....2015.000
being marked and numbered as per margin, and are
to be delivered in the like good order and condition
at the aforesaid port of discharge, unto Order or to
its, his or their Assigns. Freight for the said Goods to

be paid at aforesaid port of discharge, as per margin, in United States Gold Coin, at the rate of 4 dollars 80 cents per Pound Sterling. Average (if any) payable according to York-Antwerp Rules, 1890, and to be adjusted and settled in San Francisco.

(The Act of God, Perils of the Sea, Fire, Barratry of the Master and Crew, Enemies, Pirates, Thieves (but not pilferage), [27] arrest and restraint of Princes, Rulers and People, Collisions, Stranding and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment, of the Pilot, Master, Mariners, or other servants of the Shipowner, and with liberty to sail with or without Pilots, and to tow and assist Vessels in all situations.)

Weight and contents unknown, Ship not accountable for leakage, breakage, or rust, unless occasioned by improper stowage.

IN WITNESS whereof the Master, Owner(s), or Agent(s) of the said Ship or Vessel has signed two Bills of Lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in Rotterdam, this 17th day of Sept., 1907.

C. G.,

Master. [28]

COPY.

MARKS AND/OR NUMBERS.

4/5% Lackenby

“B”

Separately stowed from any other Iron on board, and to be delivered accordingly.

Freight and all conditions as per charter-party dated
19/20th August, 1907.

For immediate export, wholly or partly.

B No. 2

SHIPPED, in good order and condition, by WILSON, MEYER & CO., of Liverpool, in and upon the good Ship or Vessel, called the "DUC D'AUMALE" whereof ——— is Master for the present Voyage, and now lying in the port of Rotterdam, and bound for San Francisco, Cala.

Weight.
Tons

A quantity of silicious pig iron said to be
four hundred tons.....400
being marked and numbered as per margin, and are to be delivered in the like good order and condition at the aforesaid port of discharge, unto Order or to its, his or their Assigns. Freight for the said Goods to be paid at aforesaid port of discharge, as per margin, in United States Gold Coin, at the rate of 4 dollars 80 cents per Pound Sterling. Average (if any) payable according to York-Antwerp Rules, 1890, and to be adjusted and settled in San Francisco.

(The Act of God, Perils of the Sea, Fire, Barratry of the Master and Crew, Enemies, Pirates, Thieves (but not pilferage), [29] arrest and restraint of Princes, Rulers and People, Collisions, Stranding and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment, of the Pilot, Master, Mariners, or other servants of the Shipowner, and with liberty to sail

with or without Pilots, and to tow and assist Vessels in all situations.)

Weight and contents unknown, Ship not accountable for leakage, breakage, or rust, unless occasioned by improper stowage.

IN WITNESS whereof the Master, Owner(s), or Agent(s) of the said Ship or Vessel has signed two Bills of Lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in Rotterdam, this 5th day of Septr., 1907.

C. G.,

Master. [30]

COPY.

MARKS AND/OR NUMBERS.

“C”

No. I Clarence

Separately stowed from any other Iron on board, and to be delivered accordingly.

Freight and all conditions as per charter-party dated 19/20th August, 1907.

For immediate export, wholly or partly.

No. 1

SHIPPED, in good order and condition, by WILSON, MEYER & CO., of Liverpool, in and upon the good Ship or Vessel, called the “DUC D’AUMALE” whereof ——— is Master for the present Voyage, and now lying in the port of Rotterdam, and bound for San Francisco, Cala.

Weight.

Tons

A quantity of pig iron said to be two hundred

& sixty tons.....260

being marked and numbered as per margin, and are

to be delivered in the like good order and condition at the aforesaid port of discharge, unto Order or to its, his or their Assigns. Freight for the said Goods to be paid at aforesaid port of discharge, as per margin, in United States Gold Coin, at the rate of 4 dollars 80 cents per Pound Sterling. Average (if any) payable according to York-Antwerp Rules, 1890, and to be adjusted and settled in San Francisco.

(The Act of God, Perils of the Sea, Fire, Barratry of the Master and Crew, Enemies, Pirates, Thieves (but not pilferage), [31] arrest and restraint of Princes, Rulers and People, Collisions, Stranding and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment, of the Pilot, Master, Mariners, or other servants of the Shipowner, and with liberty to sail with or without Pilots, and to tow and assist Vessels in all situations.)

Weight and contents unknown, Ship not accountable for leakage, breakage, or rust, unless occasioned by improper stowage.

IN WITNESS whereof the Master, Owner(s), or Agent(s) of the said Ship or Vessel has signed two Bills of Lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated in Rotterdam, this 5th day of Septr., 1907.

C. G.,
Master.

[Endorsed]: Filed Dec. 28, 1908. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk. [32]

(Title of Court and Cause, and Number.)

Claim of Hermann L. E. Meyer et al. (13,941).

To the Honorable JOHN J. DE HAVEN, Judge of
the District Court of the United States for the
Northern District of California:

The claim of Hermann L. E. Meyer, George H. C. Meyer, H. L. E. Meyer, Jr., J. W. Wilson and — Quaille, partners under the name of Meyer, Wilson & Co., to the cargo of the French ship “Duc d’Aumale,” now in the custody of the Marshal of the United States for the said Northern District of California, at the suit of Compagnie Maritime Francaise alleges:

That they are the true and *bona fide* owners of the said cargo, and that no other person is owner thereof.

WHEREFORE, the claimants pray that this Honorable Court will be pleased to decree a restitution of the same to them and otherwise right and justice to administer in the premises.

HERMAN L. E. MEYER,
GEO. H. C. MEYER,
H. L. E. MEYER, Jr.,
J. W. WILSON,
——— QUAILE,

By Their Atty. in Fact.

HERMAN L. E. MEYER,
PAGE, McCUTCHEN & KNIGHT,
Proctors for Claimant.

(Duly verified.)

[Endorsed]: Filed Nov. 30, 1908. Jas. P. Brown,
Clerk. By John Fougla, Deputy Clerk. [33]

(Title of Court and Cause.)

Claim (13,959).

To the Honorable JOHN J. DE HAVEN, Judge of
the District Court of the United States for the
Northern District of California:

The claim of Compagnie Maritime Francaise, a
corporation, organized under the laws of France, to
the French Bark "Duc d'Aumale," her tackle, ap-
parel and furniture, now in the custody of the Mar-
shal of the United States for the said Northern Dis-
trict of California, at the suit of Hermann L. E.
Meyer et al., alleges:

That said claimant is the true and *bona fide* owner
of the said bark "Duc d'Aumale," her tackle, apparel
and furniture, and that no other person is owner
thereof.

WHEREFORE, this claimant prays that this
Honorable Court will be pleased to decree a restitu-
tion of the same to said claimant and otherwise right
and justice to administer in the premises.

P. LALANDE.

P. Lalande, deposes and says that he was and is the
master of said vessel, and that at the time of the said
arrest thereof, he was in possession of the same as the
lawful bailie thereof for the said owner, and that said
owner resides out of the said Northern District of
California, and more than one hundred miles from
the city of San Francisco, in said District.

ANDROS & HENGSTLER,

Proctors for Claimant.

(Duly verified.)

[Endorsed]: Filed Dec. 28, 1908. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk. [34]

(Title of Court and Cause, and Number.)

(13,941.)

Answer.

To the Honorable JOHN J. DE HAVEN, Judge of the District Court of the United States, for the Northern District of California:

The answer of Hermann L. E. Meyer, George H. C. Meyer, Hermann L. E. Meyer, Jr., J. W. Wilson and John M. Quaile, copartners doing business under the style of Meyer, Wilson & Co., claimants of the cargo of the French barque "Duc d'Aumale," to the libel of Compagnie Maritime Francaise, a corporation, filed herein, alleges as follows:

FIRST.

That as to the allegations contained in article the first of said libel, these claimants have no information or belief upon the subject thereof, whereby they call for proof thereof.

SECOND.

Claimants admit the allegations of article the second of said libel.

THIRD.

Answering unto the third article in said libel, said claimants aver that there were no other agreements concerning the chartering of said vessel than are contained in the written charter-party, a copy whereof is annexed to the libel herein.

FOURTH.

Answering unto the fourth article in said libel set

forth, said claimants deny that at the time the charterers [35] shipped at the port of Rotterdam, and the master and said Compagnie Maritime Francaise there received on board the said barque the cargo referred to in said article, the said barque was tight, staunch and strong, or tight, staunch or strong, or in every or any way fitted for the voyage of said barque from the port of Rotterdam to the port of San Francisco, and in this behalf said claimants aver that at said time, and at the time of said barque sailing from Rotterdam, her hull was in an unseaworthy condition and the said cargo on board said barque was improperly stowed. Claimants deny that two thousand (2,000) tons or any number of tons in excess of two thousand (2,000) constituted the quantity of coke so shipped on board said barque, and in this behalf claimants aver that the amount so shipped did not exceed in quantity one thousand nine hundred and eighty-three (1,983) tons. Claimants deny that upon the arrival of said barque at the port of San Francisco she was directed by charterers, as consignees, to a wharf within the Golden Gate for discharge.

FIFTH.

Claimants deny that at all or any of the times since the making of said charter-party, or at any other time, libellant, has well and truly, or well or truly performed all and singular or all or singular the covenants and undertakings in said charter-party on its part to be performed, and in this behalf claimants aver that the bills of lading issued by said master of said barque provided that said cargo should be de-

livered in the like good order and condition in which said cargo was shipped, and that said cargo was in fact shipped in good order and condition on or about the 19th day of September, 1907; that said barque arrived at the port of San Francisco on [36] or about the 19th day of November, 1908, and claimants aver that they were at all times ready and willing to pay the freight thereon as provided in said bills of lading and by said charter-party, but that as to the coke cargo, transported by said barque, said cargo was not delivered to claimants in as good order and condition as when received by said barque, but, on the contrary, was injured and damaged by salt water to the extent that said merchandise on delivery thereof was not worth in the market anything whatever after deduction of freight and duties, and in this behalf claimants further aver that the damage and injury aforesaid to the said cargo was not caused by the act of God or any peril of the sea or other peril excepted in and by said bills of lading or the said charter-party, but solely by the negligence of the owners and master of the said ship in this, that the said ship at the time of sailing from said Rotterdam was in an unseaworthy condition as to the hull thereof, and was improperly stowed, all in violation of the terms of said bills of lading and of said charter-party, so that leaks sprang in said ship and compelled the *maters* to deviate from his voyage and seek a port of refuge and to run said ship ashore at a point in the Falkland Islands where the said vessel was beached and subsequently taken off and taken to Montevideo and thence to Buenos Ayres, where

she was repaired. That long delays were incurred in attempting to float and repair said barque, requiring the discharge of her cargo, which discharge involved great damage thereto and that the submersion thereof, as well in the ship while seeking a port of refuge as thereafter while she was stranded, saturated the said cargo with salt water and further injured the same so that the same [37] became and was of little value and worth less than the freight and duties thereon. That instead of being delivered to claimants at the time at which the said voyage would ordinarily have ended, to wit, about the month of March, 1908, provided said barque had been seaworthy on sailing, the said cargo was not delivered until the month of December, 1908. Further answering, the said claimants aver that the said barque failed, neglected and refused to deliver said one thousand nine hundred and eighty-three (1,983) tons of coke, but only delivered one thousand eight hundred and sixty-four (1,864) tons—206/2240 tons thereof.

That by reason of the negligence of the said owners and the said master of said bark and the injury to said merchandise, claimants have been damaged in the sum of seventeen thousand (17,000) dollars.

SIXTH.

That as to the pig iron, alleged to consist of about six hundred and sixty (660) tons thereof, shipped on board said barque, about four hundred (400) tons thereof was silicious pig iron, and that by reason of the matters hereinbefore set forth, and the negligence of the owners of said ship, the arrival of said barque at San Francisco was wrongfully delayed for

a period of not less than eighty (8) months, and by reason thereof, claimants lost the opportunity to sell one hundred (100) tons of the said merchandise at the then prevailing price, which was in excess of the price ruling therefor in the market of San Francisco at the date of their arrival, whereby claimants were damaged in the sum of one [38] thousand and seventeen (1,017) dollars. That the balance of said pig iron consisted of about two hundred and sixty (260) tons thereof, and that by reason of the matters hereinbefore set forth and the negligence of the owners of said barque, the arrival of said barque at San Francisco was wrongfully delayed for a period of not less than eight (8) months, and by reason thereof claimants lost the opportunity of selling one hundred and sixty (160) tons of the said merchandise at the then prevailing price, which was in excess of the price ruling therefor in the market of San Francisco at the date of their arrival, to the damage of claimants in the sum of one thousand two hundred and eighty-eight and $73/100$ (1,288.73) dollars.

That the owners of said barque have failed, neglected and refused to pay any of the damages hereinbefore alleged to have been suffered by claimants, and that no part thereof has been paid.

SEVENTH.

Further answering unto the libel herein, these claimants aver that after the sailing of said ship from Rotterdam aforesaid on the said voyage, she sprang a leak, so that the master thereof was compelled to seek the Falkland Islands as a refuge and there to beach his said vessel. That the said ship

was thereafter floated and taken first to Montevideo and thence to Buenos Ayres where the said coke and iron were discharged, warehoused and afterwards restowed on board of said vessel. That by reason of the submersion of said coke in the hold of the said vessel during the voyage entered upon to said port of refuge and during several weeks while she lay on the beach at the Falkland Islands, the said coke was saturated with salt water to such an extent that it became of less value [39] than the cost of further transportation to San Francisco and that it became the duty of the master, acting on behalf of these claimants, who were not present or represented at said Montevideo or Buenos Ayres, to prevent the accumulation of useless charges thereon and to cause the same to be sold, but the said master, in violation of his said duty, nevertheless proceeded to restow the said coke at great expense, said expense being enhanced by the largely increased weight thereof due to its absorption of water, while such value as said coke might have had was diminished by the additional handling thereof in the restowage thereof.

That claimants are not able to state what costs were made chargeable upon the said coke by the discharging and restowing thereof and by warehousing the same, but they aver that such charges added to the cost of freight thereon, made the said coke valueless to them at the port of destination and that it was worth less than the duties and freight. That large cost was also incurred in the handling and restowage of the iron hereinbefore referred to.

That in addition to the said charges hereinabove referred to, salvage charges were incurred in the

salvage of ship and cargo which, as claimants are informed, will be sought to be enforced against claimants as consignees of said coke and iron. That delivery thereof was made at San Francisco only on condition that the claimants would, and they did, sign a general average bond whereby they agreed to pay all general average charges that might be found to be lawfully due by them on said cargo. That they are ignorant what said charges are or in what amount it may be claimed that they are liable in general average, but on their information and [40] belief they aver that the said amount will not be less than six thousand (6,000) dollars. They further aver that all of said charges, if the same shall be imposed upon them, will be a loss due entirely to the neglect of the master of said ship to properly care for the said cargo and by reason of the fact that the said ship was unseaworthy in her hull and improperly stowed at the time of departure from Rotterdam on her said voyage to San Francisco.

EIGHTH.

These claimants deny that libellant has been damaged by the neglect and refusal or neglect or refusal of claimants to pay the said freight specified in said libel, or any part thereof, and deny that the said freight that might be due, were it not for the damages hereinbefore specified as having been suffered by claimants, would exceed the sum of sixteen thousand five hundred and sixty and $64/100$ (16,560.64) dollars, and these claimants aver that their damage, as hereinbefore set forth, far exceeds said sum last mentioned, and that of said sum last mentioned, one

thousand one hundred and seventy-three and 75/100 (1,173.75) dollars has been paid to or for the account of libellant.

Answering unto article eighth of said libel, these claimants deny that all and singular the premises contained in said libel are true, save as the allegations of said libel may have been admitted by this answer.

WHEREFORE claimants pray that the libel herein filed may be dismissed and that claimants recover their costs and charges herein incurred, and for such other relief as may be just.

PAGE, McCUTCHEN & KNIGHT,

Proctors for Claimants.

(Duly verified.)

[Endorsed]: Filed Jul. 6, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. [41]

(Title of Court, Cause and Number.)

(13,959.)

Answer of Claimant.

To the Honorable JOHN J. DE HAVEN, Judge of the District Court of the United States for the Northern District of California:

The answer of Compagnie Maritime Francaise, claimant of said French bark "Duc d'Aumale," to the libel of Hermann L. E. Meyer, et al., on file herein, alleges as follows:

ANSWER TO THE FIRST ALLEGED CAUSE
OF ACTION.

I.

Claimant admits the allegations of Article I of said libel.

II.

Claimant admits the allegations of Article II of said libel, except the parenthetical allegation in line 33, page 1 of said libel, reading as follows: “(nineteen hundred and eighty-three tons).” As to said allegation, claimant denies the same.

III.

Claimant admits the allegations of Article III of said libel.

IV.

Claimant denies that libelants were at all times or at any time ready or willing to pay the freight on the merchandise in said article mentioned as provided in the bill of lading therein mentioned, or at all. Claimants denies that said merchandise was injured or damaged by salt water or in any other way to the extent that said merchandise, on delivery thereof, was not worth in the market anything whatever after deduction of freight and duties or freight or duties; denies that said merchandise was injured or damaged to the extent that its market value was injured or affected; and denies that its value in the market was impaired or affected by the alleged injury or damage by salt water, in said article mentioned, or by any alleged injury or damage by salt water or otherwise. [42]

V.

Claimant denies that said alleged damage or injury to said merchandise was not caused by the act of God or by peril of the sea or by other peril excepted in the bill of lading mentioned, and claimant denies that said alleged damage or injury was caused solely or at all by the negligence of the owners or master of the said ship in the respect alleged in said article, or in any other respect, or at all. Claimant denies that said ship was in an unseaworthy condition at the time of sailing from Rotterdam as to the hull thereof or was unseaworthy in any other respect; and denies that said ship was improperly stowed at the time of sailing from Rotterdam. Claimant denies that leaks or any leak sprung in said ship by reason of the negligence of the owners or master of said ship, or by reason of any unseaworthy condition thereof at the time of sailing from Rotterdam, or by reason of any improper stowage, or by reason of any act or default of said owners or master of said ship; and in this behalf claimant alleges that the leak sprung in said ship, in article V mentioned, was caused by the act of God or perils of the sea. Claimant denies that the discharge of the cargo of said ship, in article V mentioned, involved great or any damage to said cargo. Claimant denies that the submersion of said ship or cargo, in article V mentioned, saturated said cargo with salt water to such an extent that the same became or was of little value or less value than otherwise it would have been; and claimant denies that said discharge or said submersion injured said cargo in any respect.

Claimant alleges that said ship was seaworthy on sailing.

VI.

Claimant denies that the libelants have been damaged in the sum of Seventeen Thousand Five Hundred Dollars (\$17,500), or in any other sum, by reason of any negligence of the said owners or said master, or by reason of the alleged or any injury to said merchandise, or [43] by reason of anything done or omitted by said owners or said master or by this claimant.

VII.

Claimant denies that all or singular or any of the premises in article VIII referred to are true, except as in this answer admitted.

And for a further and distinct answer to the alleged first cause of action in said libel stated claimant alleges that claimant did exercise due diligence and did properly equip, man, provision and outfit said vessel, and did make the said vessel in all respects seaworthy and capable of performing her intended voyage; and that the master, officers, agents and servants of claimant did carefully handle and stow the cargo of libelants, and did reasonably care for the same during the voyage, and did properly deliver the same; and that the springing of the leak, in article V on page 3 of said libel alleged, and any and all damage, injury or loss that may have happened in consequence thereof, was caused by and resulted from the act of God and perils of the sea.

And for a further and distinct answer to the alleged first cause of action in said libel stated claim-

ant alleges that claimant did exercise due diligence and did properly equip, man, provision and outfit said vessel, and did make said vessel seaworthy and capable of performing her intended voyage; and that the master, officers, agents and servants of claimant did carefully handle and stow the cargo of libelants and did reasonably care for the same during the voyage, and did properly deliver the same; and that any damage, loss or injury that may have happened to the said cargo of libelants by reason of submersion, or delays or otherwise, as in the alleged first cause of action stated, were caused by and resulted from faults or errors in the navigation of or management [44] of said vessel; and that claimant is absolved from all and any liability for said loss, damage or injury by the provisions of the Act of Congress of February 13, 1893, c. 105, 27 Stat. 445.

ANSWER TO THE SECOND ALLEGED CAUSE
OF ACTION.

Answering the allegations of the alleged second cause of action in said libel claimant alleges as follows:

I.

Claimant admits the allegations of Article II, on page 4 of said libel.

II.

Claimant admits the allegations of Article II, on page 4 of said libel.

III.

Claimant admits the allegations of Article III, on page 5 of said libel.

IV.

Claimant denies that said ship sprung a leak soon after the time of her sailing on her voyage or at any time, by reason of any insufficiency or unseaworthiness or improper stowage at the time of said sailing; denies that any insufficiency or unseaworthiness or improper stowage of said ship compelled the master at any time to seek the Falkland Islands as a port of refuge. Claimant denies that the arrival of said ship at San Francisco was delayed by reason of the delay or any delay incurred as in said article alleged, or by reason of any delay caused by any insufficiency, or unseaworthiness, or improper stowage of said ship at the time of her sailing on her voyage, or by reason of any negligence, or any other act or default, of the owners of said ship; and claimant denies that libelants lost the opportunity to sell one hundred (100) tons of said [45] merchandise, or any number of tons thereof, at the then prevailing or any price by reason of any delay incurred through any negligence of the owners of said ship or this claimant, or by reason of anything done or omitted by this claimant, or by reason of any insufficiency or unseaworthiness or improper stowage of said ship; and denies that libelants were damaged in the sum of One Thousand Seventeen Dollars (\$1,017), or any other sum whatever, by any act or default of said ship or this claimant.

V.

Claimant denies that all or singular the premises in Article VII, page 6 of said libel, referred to are true, except as in this answer admitted.

And for a further and distinct answer to the alleged second cause of action in said libel stated claimant alleges that claimant did exercise due diligence and did properly equip, provision, man, and outfit said vessel, and did make the said vessel in all respects seaworthy and capable of performing her intended voyage; and that the master, officers, agents and servants of claimant did carefully handle and stow the cargo of libelants, and did reasonably care for the same during the voyage, and did properly deliver the same; and that the springing of the leak, in Article IV on page 5 of said libel alleged, and any and all damage, injury or loss that may have happened in consequence thereof, was caused by and resulted from the Act of God and perils of the sea.

And for a further and distinct answer to the alleged second cause of action in said libel stated claimant alleges that claimant did exercise due diligence and did properly equip, man, provision and outfit said vessel, and did make said vessel seaworthy and [46] capable of performing her intended voyage; and that the master, officers, agents and servants of claimant did carefully handle and stow the cargo of libelants and did reasonably care for the same during the voyage, and did properly deliver the same; and that any damage, loss or injury that may have happened to the said cargo of libelants by reason of submersion or delays or otherwise, as in the alleged second cause of action stated, were caused by and resulted from faults or errors in the navigation of or management of said vessel; and that claimant is absolved from all and any liability for said

loss, damage or injury by the provisions of the Act of Congress of February 13, 1893, c. 105, 27 Stat. 445.

ANSWER TO THIRD ALLEGED CAUSE OF ACTION.

Answering the allegations of the alleged third cause of action in said libel, claimant alleges as follows:

I.

Claimant admits the allegations of Article I, on page 6 of said libel.

II.

Claimant admits the allegations of Article II, on page 6 of said libel.

III.

Claimant admits the allegations of Article III, on page 7 of said libel.

IV.

Claimant denies that said ship sprung a leak soon after the time of her sailing on said voyage or at any time by reason of the insufficiency, or unseaworthiness, or improper stowage thereof at the time of her sailing; and denies that any insufficiency or unseaworthiness or improper stowage of said ship existed at the time [47] of her sailing; denies that any insufficiency or unseaworthiness or improper stowage compelled the master to seek the Falkland Islands as a port of refuge. Claimant denies that the arrival of said ship at San Francisco was delayed by reason of the delay, or any delay incurred as in said article alleged, or by the negligence or any negligence, or any other act or default, of the owners of said ship, or by reason of any delay caused by any

insufficiency, or unseaworthiness, or improper stowage of said ship at the time of her said sailing on her voyage; and claimant denies that the libelants lost the opportunity to sell one hundred and sixty (160) tons of the said merchandise, or any number of tons thereof, at the then or at any time prevailing price, or any price, by reason of any delay incurred through any negligence of the owners of said ship, or by reason of anything done or omitted by the claimant, or by reason of any insufficiency or unseaworthiness or improper stowage of said ship; and denies that libelants were damaged in the sum of One Thousand Two Hundred and Eighty-eight 73/100 Dollars (\$1,288.73), or any other sum whatever, by any act or default of this claimant.

V.

Claimant denies that all and singular the premises in Article VII, on page 8 of said libel, referred to are true, except as in this answer admitted.

And for a further and distinct answer to the alleged third cause of action in said libel stated claimant alleges that claimant did exercise due diligence and did properly equip, man, provision and outfit said vessel, and did make the said vessel in all respects seaworthy and capable of performing her intended voyage; and that the master, officers, agents and servants of claimant did carefully handle and stow the cargo of libelants, and did reasonably care for the same during the voyage, and did properly deliver the same; and [48] that the springing of the leak, in Article IV on page 7 of said libel alleged, and any and all damage, injury or loss that may

have happened in consequence thereof, was caused by and resulted from the act of God and perils of the sea.

And for a further and distinct answer to the alleged third cause of action in said libel stated claimant alleges that claimant did exercise due diligence and did properly equip, man, provision and outfit said vessel, and did make said vessel seaworthy and capable of performing her intended voyage; and that the master, officers, agents and servants of claimant did carefully handle and stow the cargo of libelants and did reasonably care for the same during the voyage, and did properly deliver the same; and that any damage, loss or injury that may have happened to the said cargo of libelants by reason of submersion, or delays or otherwise, as in the alleged third cause of action stated, were caused by and resulted from faults or errors in the navigation of or management of said vessel; and that claimant is absolved from all and any liability for said loss, damage or injury by the provisions of the Act of Congress of February 13, 1893, c. 105, 27 Stat. 445.

ANSWER TO THE FOURTH CAUSE OF ACTION.

Answering the allegations of the alleged fourth cause of action in said libel, claimant alleges as follows:

I.

Claimant admits the allegations of Article I, on page 8 of said libel.

II.

Claimant admits the allegations of Article II, on page 8 of said libel. [49]

III.

Claimant admits the allegations of Article III, on pages 8 and 9 of said libel.

IV.

Claimant denies that, by reason of the submersion of the coke carried in the hold of said vessel, as in Article IV, on page 9 of said libel stated, the said coke was saturated with salt water to such an extent that it became of less value than the cost of further transportation to San Francisco; and on this behalf claimant alleges that it is ignorant of the extent to which said coke was then and there saturated and of the extent to which its value was thereby affected, and on that ground calls for proof of the allegations referring thereto in said article. Claimant denies that it became the duty of the master, acting on behalf of libelants, to cause the said coke to be sold, and on this behalf alleges that it was not reasonably possible to sell the said coke. As to the allegation that libelants were not present or represented at said Montevideo or Buenos Ayres, claimant is ignorant, and therefore calls for proof thereof. Claimant denies that the master acted in violation of his alleged or any duty in restowing the said coke. As to the extent, if any, to which the expense of restowing said coke was enhanced by the increased weight thereof; and the extent, if any, to which the value of said coke was diminished by the additional handling thereof, claimant is ignorant, and on that ground asks for proof of the allegations in said Article IV referring thereto. But claimant alleges that the master of said ship acted in the reasonable interest

of and in accordance with his duty to libelants and all concerned in restowing the said cargo and carrying it to destination; and denies that any expense or charges thereby incurred were caused by any act or default of claimant. Claimant [50] denies that the aggregate charges for discharging, restowing and warehousing said coke, added to the cost of freight thereon, made the said coke valueless to said libelants at the port of destination, and denies that said coke was worth less than the duties and freight. Claimant denies that the cost incurred in the handling or restowage of the iron in said article referred to was caused by any act or default of the master or this claimant.

As to the allegations of said Article IV, on page 10 of said libel, that the amount of the general average charges for which libelants may be or become liable will not be less than six thousand dollars (\$6,000), claimant is ignorant, and for that reason calls for proof thereof. Claimant denies that all, or any, of the general average charges that may be imposed upon libelants under their general average bond in said article mentioned, will be or are a loss due entirely or due partly or due at all to the neglect of the master of said ship to properly care for the said cargo or to any act or default of the master of this claimant in this regard; and claimant denies that all or any of said general average charges will be or are a loss due entirely or due partly or due at all to any unseaworthiness in the hull of said ship or to any improper stowage at the time of the departure from Rotterdam on the voyage to San Fran-

cisco, or to any act or default of this claimant in this regard. Claimant denies that libelants are damaged in the sum of six thousand dollars or any amount whatever in respect to anything in said article alleged, or by reason of any act or default of this claimant.

V.

Claimant denies that all or singular the premises in Article V, on page 11 referred to are true, except as in this answer admitted. [51]

And for a further and distinct answer to the alleged fourth cause of action in said libel stated claimant alleges that said claimant did exercise due diligence and did properly equip, provision and outfit said vessel, and did make said vessel in all respects seaworthy and capable of performing her intended voyage; and that the master, officers, agents and servants of claimant did carefully handle and stow the cargo of libelants, and did reasonably care for the same during the voyage, and did properly deliver the same; and that the springing of the leak in Article IV of said libel, page 9, alleged, and any and all damage or injury to libelant's cargo consequent thereupon, was and were caused by act of God or perils of the sea.

And for a further and distinct answer to the alleged fourth cause of action in said libel stated claimant alleges that said claimant did exercise due diligence and did properly equip, man, provision and outfit said vessel, and did make said vessel seaworthy and capable of performing her intended voyage; and that the master, officers, agents and ser-

vants of claimant did carefully handle and stow the cargo of libelants and did reasonably care for the same during the voyage, and did properly deliver the same; and that any loss, damage or injury to the cargo, in the nature of expenses against the same or otherwise, and any charges against the same, of general average or otherwise, which said loss, damage or injury accrued against said cargo subsequent to the springing of the leak in article IV on page 9 of said libel mentioned, were caused by or resulted from faults or errors in the navigation or the management of said vessel, and that claimant is absolved from all and any liability for said loss, damage or injury by the provisions of the Act of Congress of February 13, 1893, c. 105, 27 Stat. 445. [52]

WHEREFORE claimant prays that the libel herein filed may be dismissed, and that claimant recover its costs and charges herein incurred, and for such other relief as may be just.

ANDROS & HENGSTLER,
Proctors for Claimant.

(Duly verified.)

[Endorsed]: Filed Jun. 1, 1909. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk. [53]

(Title of Court and Cause.)

**Deposition of George Ledru, Taken on Behalf of the
Respondent Before Francis Krull, Esq., United
States Commissioner, etc.**

BE IT REMEMBERED, that on Thursday, March 25th, 1909, pursuant to stipulation of counsel here-

unto annexed, at the office of L. T. Hengstler, Esq., in the Kohl Building, in the City and County of San Francisco, State of California, personally appeared before me, Francis Krull, Esq., a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., George Ledru, a witness produced on behalf of the respondent.

W. S. Burnett, Esq., appeared as proctor for the libelants, and L. T. Hengstler, Esq., appeared as proctor for the respondent, and the said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth. [54]

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the deposition of George Ledru may be taken *de bene esse* on behalf of the Respondent at the office of L. T. Hengstler, Esq., in the Kohl Building, in the City and County of San Francisco, State of California, on Thursday, March 25th, 1909, before Francis Krull, Esq., a United States Commissioner for the Northern District of California, and in shorthand by Edward W. Lehner.

It is further stipulated that the deposition, when written out, may be read in evidence by either party on the trial of the cause; that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said deposition, and that all objections as

(Deposition of George Ledru.)

to materiality and competency of the testimony are reserved.

It is further stipulated that the deposition may be used and read in evidence in the case of the *Compagnie Maritime Francaise*, a French Corporation, Libellant, vs. The Cargo of the French Bark "Duc d'Aumale."

It is further stipulated that the reading over of the testimony to the witness and the signing thereof is hereby expressly waived.

F. Henry, by stipulation, acted as Interpreter.)

[55]

GEORGE LEDRU, called for the claimant, sworn.

(F. Henry was sworn as interpreter.)

Mr. HENGSTLER.—Q. Captain, what is your full name? A. George Ledru.

Q. You are the master of the French vessel "La Peruse," are you not? A. Yes, sir.

Q. How long have you been master of vessels generally? A. Since October, 1902.

Q. Are you familiar with the French bark "Duc d'Aumale"? A. Yes; I know her well.

Q. How does your present vessel, the "La Peruse," and the bark "Duc d'Aumale" compare as to type of construction and size?

A. As far as construction and type of the vessel is concerned, they are very nearly the same.

Q. Captain, have you ever carried in your vessel a cargo consisting of coke and pig iron?

A. Yes, this present voyage.

(Deposition of George Ledru.)

Q. In the "La Peruse"? A. Yes, sir.

Q. Then you are familiar with the stowage of a cargo of that type, are you, Captain? A. Yes, sir.

Q. Your vessel has a between-decks and a lower hold, has it not? A. Yes, sir.

Q. How, in a general way, is the cargo distributed as to the quantity which is carried in the between decks and the quantity which is carried in the lower hold? A. You mean a general cargo?

Q. In the case of a general cargo, yes.

A. For a 2,800 ton cargo, 800 tons in the between-decks and 2,000 to 2,100 in the hold.

Q. Would that rule vary in the case of a cargo consisting of coke and pig iron?

A. No, it does not vary.

Q. Then I understand, Captain, that it does not make any difference [56] whether it is a general cargo or whether it is a specific cargo, the general proportion would be about the same, would it not?

A. The proportion would be about the same. The space would be more or less larger, but the weight would be the same.

Q. That means the proportion of the weight would be the same? A. Yes, sir.

Q. Supposing the entire cargo were 3,000 tons, how should it be distributed,—about?

A. If the cargo is 3,000 tons, the between-decks would carry from 800 to 850, and the balance in the hold.

Q. Now, Captain, if it appears that in the case of the "Duc d'Aumale" there was 760 tons of cargo in

(Deposition of George Ledru.)

the between-decks and about 1900 tons in the lower hold, is that the correct stowage as far as this general rule is concerned, which you have mentioned?

A. Yes, sir; because the proportion I have indicated is not an absolute rule—20 tons or more or less.

Q. In other words, there is some latitude in this?

A. Yes, according to the nature of the cargo.

Q. Captain, do you know what the cubic contents of the “La Peruse” and the “Duc d’Aumale” are?

A. Yes. The cubic contents of both vessels is about the same. There is about 4,900 cubic meters.

Q. Now, Captain, I want to show you the stowage plan of the “Duc d’Aumale,” marked “Respondent’s Exhibit 7,” from which you notice that there are in the lower hold about 600 tons of pig iron in the place indicated on the plan, and in the between-decks about 60 tons of pig iron stowed in the place indicated here. From your experience in stowing vessels, can you tell whether the place of stowage of that cargo is the proper place, assuming that the entire rest of the hold is filled up with coke?

A. In my opinion, it is the best place for such a cargo of coke. [57]

Q. For such a cargo of coke and pig iron?

A. And pig iron.

Q. Captain, generally speaking, in what place in your vessel would you put the pig iron if there are 660 tons of pig iron to be carried and the rest of the cargo is coke?

A. At the same place where it is there.

Q. What place is that, Captain?

(Deposition of George Ledru.)

A. It is the place the widest in the ship, and where the ship is strongest.

Q. It is the widest and strongest part of the vessel, is it? A. Yes, sir.

Q. Now, Captain, as to the distribution of this cargo of pig iron, having 600 tons in the hold and 60 tons in the between-decks, would you say that that was a proper distribution? A. Yes, sir.

Q. Why, Captain?

A. The vessel, with 60 tons of pig iron in the between-decks and the cargo of coke which was filling up the between-decks, was sufficiently stable.

Q. With this method of stowage have you any means of telling where the center of gravity would be located on this ship,—about?

A. Approximately, yes.

Q. Where?

A. About at the eye of the between-deck near the mainmast.

Q. What would be the effect upon the center of gravity, Captain, if more than 60 tons of pig iron had been placed in the between-decks?

A. The center of gravity would have been raised.

Q. It would lie higher? A. Yes, sir.

Q. And what would be the effect of that on the stability of the vessel?

A. The vessel would have been less stable, the rolling would have been greater.

Q. Now, Captain, assuming that the number of tons of pig iron in the between-decks is not changed and that there are left in the lower hold 600 tons of

(Deposition of George Ledru.)

pig iron, but that they are distributed [58] differently in the lower hold from the way in which they are distributed here, and are distributed this way: one pile of pig iron is placed in the fore part of the after hatch; about 350 tons are placed there; another pile is placed in the after part of the after hatch, and a part is placed just abaft of the foremast, the coke being just the same. What would the effect of that spreading of the pig iron in the lower hold be upon the vessel? Would she be more stable or less stable than she was with the former method of stowage?

A. As far as the stability of the ship is concerned, it is not a case of very much importance.

Q. Would that change in the stowage affect the vessel in any way?

A. Yes; in my opinion the vessel would strain more.

Q. Why, Captain?

A. There is 350 tons in a small place; here in the forward part of the vessel, too, there is another pile on a small place, and between those two lots the ship has nothing to bear except the coke, which is light; and then the ship under the strain of the two weights in those extremities strains. It is like she was swinging on a pivot.

Q. Now, Captain, as I understand you, this is your answer: I hold in my hand this ruler, which we will say is part of the line of the lower hold of the vessel; at one extremity of this ruler is a weight and at the other extremity there is a weight, and between those

(Deposition of George Ledru.)

two places there is a space that bears no weight. The effect of that, by these weights pressing down upon the extremities, would be to produce a strain upon the vessel? A. Yes, at the center of the vessel.

Q. The strain being in the center of the ship?

A. Yes.

Q. Is that the only objection, Captain, that you would have to disturbing the stowage arrangement in a lump and spreading the [59] cargo as it was spread in the illustration which I gave you a while ago?

A. Did you say also there was some pig iron in the after end of the ship?

Q. Yes, aft of the after hatch.

A. In putting pig iron in the after part of the ship, it is the place where the ship is getting narrow.

Q. How is the ship there as to strength, weak or strong, as compared with the center?

A. The ship is very much weaker at this place than at the center of the ship.

Q. For that reason alone it would be objectionable to place heavy cargo in the rear of the hold, would it not?

A. For this reason alone I would not have put heavy cargo in the aft part of my vessel.

Q. Captain, how do the pumps on the "La Peruse" compare with the pumps on the "Duc d'Aumale"?

A. They are the same.

Q. Same model, same size and the same system?

A. Yes, sir.

Q. How do those pumps compare with other

(Deposition of George Ledru.)

pumps that you have seen on French vessels of the same type, Captain?

A. In general, all French vessels are provided with the same system of pumps. In this company we have the system of pump known under the name of Jappy, which some other companies have not.

Q. Do you know how many ships your company owns, Captain? A. 14.

Q. And all the ships of your company have this kind of pumps, have they? A. Yes, sir.

Cross-examination.

Mr. BURNETT.—Q. Was your cargo exclusively pig iron and coke on the last voyage that brought you to San Francisco?

A. No; there was some girders.

Q. Was that the only other cargo in addition to pig iron and coke? A. Yes, sir. [60]

Q. What tonnage of girders did you have?

A. 535 tons.

Q. How much pig iron? A. 175 tons.

Q. How much coke? A. 2,000 tons.

Q. So your total cargo was 2,710 tons?

A. Yes, 2,705 to 2,710 tons. On the coke I don't know at 10 tons more or less what I had.

Q. Was the cubic carrying capacity exhausted?

A. Yes, sir.

Q. Do you know what tonnage of cargo the "Duc d'Aumale" carried? A. You mean dead weight?

Q. Yes.

A. The "Duc d'Aumale" can carry the same

(Deposition of George Ledru.)

amount of cargo as the "La Peruse," which is about 3,000 tons.

Q. Now, would you draw a rough sketch showing the manner of stowage of your vessel on this last trip.

A. The girders were placed from the after hatch up to the mainmast, the largest part, about 400 tons there.

Q. Write "girders" there.

A. In the between-decks 25 tons of girders, and the balance of the girders, about 110 tons, in the main hatch—under the main hatch. At the after part of the after hatch in the between-decks there was 50 tons of pig iron, and the balance of the pig iron was stowed under the 400 tons of girders, about 100 tons.

Q. 25 tons of pig iron?

A. There was also 25 tons of pig iron stowed at the foot of the mainmast.

Q. And the rest of the cargo was coke distributed throughout the ship? A. Yes, full of coke.

Q. And your vessel was filled up entirely?

A. Yes, everything was filled up.

Q. Describe these girders; what are they in length?

A. They are steel beams, the longest are about 40 feet long.

Q. They are not curved, are they? A. No, sir.

Q. They are straight? A. Yes, sir. [61]

Q. Did you carry your ship's stores in the same relative portion of your vessel as the "Duc d'Aumale" did? A. Yes, sir.

(Deposition of George Ledru.)

Q. What was the weight of your stores?

A. About 60 tons, including the coal and water.

Q. Did that completely fill the space reserved for stores on the vessel when she started?

A. Not quite. There is the water; there is the storeroom; there is the coal.

Q. Did you carry coal as indicated on the sketch?

A. We had 30 tons of coal as marked in the sketch.

Mr. BURNETT.—I will ask to have that marked Libelants' Exhibit "X."

(The diagram is marked Libelants' Exhibit "X.")

Q. Do you know whether the "Duc d'Aumale" carried that 30 tons of coal in the position that you have indicated? A. 30 tons, when she left.

Q. Was the "Duc d'Aumale" built by the same people that built your vessel? A. No, sir.

Q. Do you know the beam of the "Duc d'Aumale" at the center? A. A little more than 12 meters.

Q. Is that the same measurement as your own vessel at the same point of the vessel?

A. Yes. As far as the hull is concerned, it is the same ship.

Q. Do you wish to be understood as testifying that the hull is identically the same in its measurement—the hull of the "Duc d'Aumale" as the "La Peruse"?

A. Yes, substantially.

Q. Will you state any difference that there may be in the hulls of the two vessels?

A. I don't know of any.

Q. Have you ever sailed in the "Duc d'Aumale"?

A. No, sir.

(Deposition of George Ledru.)

Q. Have you ever carried cargoes of coke, pig iron and girders, or coke and pig iron before, where that constituted the sole cargo? [62] A. No, sir.

Q. How long have you been in the "La Peruse"?

A. Two years.

Q. How many voyages before this last?

A. One voyage.

Q. What was your cargo on that voyage?

A. General cargo, cement.

Q. Any iron or girders? A. Yes, iron.

Q. Will you state roughly what your cargo was?

A. Bleaching powder, fertilizer, mineral water, liquors, cement and iron.

Q. Where was your voyage to?

A. Antwerp to San Francisco.

Q. Do you know what the weight of girders is to the cubic yard, and the space they occupy?

A. No, not exactly.

Q. Do you consider your vessel was properly stowed on the way out as per the plan you have given us?

A. My vessel was navigated in perfect condition, and did not strain.

Q. You do not think it could have been stowed in any better way than it was?

A. No. If I was to make another trip I would stow her in the same way.

Q. Why would you do that, on your experience on this voyage?

A. Yes, and from my experience in general.

Q. In referring to the plan of the "Duc d'Au-

(Deposition of George Ledru.)

male," I understand you to have testified that in your judgment that vessel was properly stowed?

A. Yes, sir.

Q. Now, does that statement rest on the assumption that the vessel was entirely filled, that is that all her carrying capacity was exhausted, and filled with the merchandise as appears from that plan?

A. I put my opinion on the fact that the ship was full of coke and the pig iron being stowed as marked on the plan, the ship should be very stable.

Q. How do you account for the fact that you carried 2,710 tons of cargo and the "Duc d'Aumale" 2,660 tons, if both were filled and [63] the carrying capacity of each vessel was the same?

A. It must be taken into consideration that the "La Peruse" had 720 tons of dead weight cargo and the "Duc d'Aumale" had only 660 tons.

Q. Where was that dead-weight cargo stowed in the "Duc d'Aumale"?

A. At the after part of the main hatch in the lower hold, and 60 tons of pig iron in the between-decks.

Q. I understand then that the "Duc d'Aumale" did not carry a full cargo; is that the net result of your testimony? A. No, sir.

Q. Without knowing the space that is occupied by girders, your conclusions as to stowage and proper stowage, where they are concerned, must be more or less guess work, must they not?

A. The pig iron and the girders occupied about the same space.

Q. Do you know what space is occupied by pig iron

(Deposition of George Ledru.)

in cubic measurements? A. No, sir.

Q. Do you know what space in cubic measurements is occupied by coke? A. No, sir.

Q. When did you become familiar with the “*La Peruse*”?

A. After the first cargo was taken at Hamburg.

Q. When was that?

A. In July, 1907.

Q. When did you become familiar with the “*Duc d’Aumale*”?

A. I have seen the “*Duc d’Aumale*” in port in 1903 at Dunkirk, and I took charge of a vessel exactly the same as the “*Duc d’Aumale*” for a month and a half to overlook the loading in place of the captain.

Q. What is the difference in rig between your boat and the “*Duc d’Aumale*”?

A. The “*Duc d’Aumale*” is a French bark, and the “*La Peruse*” is a French ship.

Redirect Examination.

Mr. HENGSTLER.—Q. There is one question I want to ask you, captain: I notice both in the stowage plan of the “*Duc d’Aumale*” [64] and in your rough sketch of the stowage of the “*La Peruse*” that the heavy cargo in the hold is not exactly in the widest part of the ship but a little aft of that. What reason is there for that?

A. To bring the ship down by the stern; the ship being very hard to go down by the stern.

Q. The heavy cargo is stowed there to make the ship go down by the stern, because if there were no

(Deposition of George Ledru.)

heavy cargo there she would not go down by the stern; that is the reason, is it not?

A. Yes, and in order to have a good navigation the vessel must be about 10 centimeters lower in the water at the stern. In the "La Peruse" I put 20 centimeters.

Q. To navigate her freely, is that the idea?

A. Yes, sir.

Recross-examination.

Mr. BURNETT.—Q. What do you call the widest part of the ship? Mark it on your diagram.

A. At the main hatch.

Q. At the opening marked "M"? A. Yes.

Q. You had practically those 110 tons of girders immediately below the main hatch?

A. Yes, sir, at the end of the other lot.

Q. Were these built up at all or were they at the bottom of the ship from side to side?

A. They were from side to side.

Q. That was true with the rest of your dead weight cargo aft, was it? A. Yes, sir.

Q. These figures on this diagram mean tons, do they, although you have not written them in?

A. Yes.

Q. On Libelants' Exhibit "X"? A. Yes.

Q. I notice from Libelants' Exhibit "X" that your vessel had a great deal more dead weight of the heavy cargo further forward than in the "Duc d'Aumale."

A. We put 50 tons of pig iron in the between-deck at the last minute, aft of the after hatch. [65]

(Deposition of George Ledru.)

Q. When you were loading your vessel you did not contemplate at first putting in that 50 tons aft, did you?

A. If the ship had been in good trim I would have put them on top of the 25 tons of girders, to be near the center of the vessel.

Q. Was that what you expected to do?

A. Yes, sir.

Q. Did you direct the stowage of this vessel yourself? A. Yes, sir, I did. [66]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I, Francis Krull, Esq., a United States Commissioner for the Northern District of California, do hereby certify that the reason stated for taking the foregoing deposition is that the testimony of the witness George Ledru is material and necessary in the cause in the caption of the said depositions named, and that he is bound on a voyage to sea and will be more than one hundred miles from the place of trial at the time of trial.

I further certify that on Thursday, March 25th, 1909, at 3 o'clock P. M., I was attended by W. S. Burnett, Esq., proctor for the libelants, L. T. Hengstler, Esq., proctor for the respondent, F. Henry, Esq., who, by stipulation, was sworn to act as interpreter, and by the witness who was of sound mind and lawful age, and that the witness was by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in

said cause; that said deposition was, pursuant to the stipulation of the proctors for the respective parties hereto, taken in shorthand by Edward W. Lehner, and afterwards reduced to typewriting; that the reading over and signing of said deposition of the witness was by the aforesaid stipulation expressly waived.

Accompanying said deposition and annexed thereto and forming a part thereof is Libelants' Exhibit "X," introduced in connection therewith and referred to and specified therein. Such exhibit is endorsed by me with my official title. [67]

I further certify that I have retained the said deposition in my possession for the purpose of delivering the same with my own hand to the United States District Court for the Northern District of California, the Court for which the same was taken.

And I further certify that I am not of counsel nor attorney for any of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto subscribed my hand at my office in the City and County of San Francisco, State of California, this 2d day of June, 1909.

[Seal]

FRANCIS KRULL,

U. S. Commissioner, Northern District of California, at San Francisco.

[Endorsed]: Filed Jun. 2, 1909. Jas. P. Brown, Clerk. [68]

(Title of Court and Cause, and Number—13,959.)

**Depositions of E. Deddes, A. Van Veen, Y. de Jonge
and J. H. v. d. Berg.**

[Seal]

To All to Whom These Presents Shall or may Come :

I, Mr. Charles Albert van Renterghem, named in the attached stipulation as commissioner to take the depositions of the within-named E. Deddes, A. Van Veen, Y. de Jonge, and J. H. v. d. Berg, upon interrogatories, direct and cross, attached to said stipulation, do hereby certify that, pursuant to said stipulation, the said witness E. Deddes, named therein, appeared before me on the 30th day of August, 1910; that said witness A. Van Veen, named therein, appeared before me on the 30th day of August, 1910; that said witness Y. de Jonge, named therein, appeared before me on the 30th day of August, 1910, and that said witness J. H. v. d. Berg, named therein, appeared before me on the 31th day of August, 1910; that upon the days mentioned, after administering oath, I took and completed the answers or deposition to said interrogatories and cross-interrogatories of each one of the said witnesses, said answers or deposition being hereunto annexed. Which said answers or deposition were taken down by a competent reporter designated by me therefor, and previously sworn to correctly take and transcribe such answers or deposition.

And I further certify that, previous to taking the said answers or deposition, I duly administered to each of said witnesses the following oath :

"You swear true answers to make to all such questions as shall be asked you upon these interrogatories and cross-interrogatories, without fear of, or favor to, either party hereto, and therein you swear to speak the truth, the whole truth, and nothing [69] but the truth, so help you God."

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my seal at Rotterdam, Holland, this 1st day of September, 1910. [70]

(Title of Court and Cause, and Number.)

Interrogatories to be Propounded to E. Deddes, at Rotterdam, Holland, on Behalf of Compagnie Maritime Francaise and French Barque "Duc d'Aumale."

1. What is your full name, age and occupation?
2. How long have you been engaged in such occupation?
3. What professional experience have you had in the stowage of vessels, in particular with cargoes of coke, and cargoes of pig iron, and mixed cargoes of coke and pig iron, or mixed cargoes of similar description stowed therein?
4. To what extent are you familiar with the French Barque "Duc d'Aumale," and vessels of her type?
5. Suppose said French Barque "Duc d'Aumale," 83 meters long in the keel, and 12 meters beam, and of 1,944 $\frac{25}{100}$ registered tons net, was loaded with 660 tons of pig iron and approximately 2,015 tons of coke, to be carried from Rotterdam around Cape Horn to the port of San Francisco, fill-

ing the vessel's entire carrying space, in the following manner: 600 tons of pig iron was stowed in the lower hold over a space about 60 feet long and 30 feet wide, extending from the after part of the mainhatch to the fore part of the after-hatch; the remaining 60 tons were kept back till the last to trim the vessel and were finally stowed in the between-decks for that purpose; the whole remainder of the space in the hold and between-decks was filled with coke, as illustrated in the diagram marked "Respondent's Exhibit 7": What is your opinion as to the propriety and efficiency of said stowage in said vessel; and what is your opinion as to the seaworthiness of said vessel as far as concerns stowage?

6. Please state the reasons for your opinion.

7. If the stowage described in the preceding question had been modified in the following respect, viz.: the 600 tons of pig iron in the lower hold had been distributed over the lower hold as follows: one pile in the fore part of the after-hatch, about 350 tons; another pile in the after part of the after-hatch, and a small pile abaft of the foremast; but otherwise the stowage of the cargo had been the same: would this modification of the stowage, in your opinion, have been more efficient, or less efficient than the method described in question 5?

8. Please state the reasons for your opinion contained in your answer to question 7.

9. Please describe the effect of the first, and the second, methods of stowage, respectively, upon the straining of the hull, and the rolling and pitching of the vessel.

10. Do you know the pumps installed in the "Duc d'Aumale"?

11. If you answer the preceding question in the affirmative, state how the pumps compare with pumps used on vessels of the same type, and state your opinion as to the sufficiency and efficiency thereof.

. Cross-interrogatories to be Propounded to
E. DEDDES.

1. Do you recognize a general rule in relation to the stowage of sailing vessels that two-thirds of the cargo should be stowed in the lower hold and one-third in the between-decks?

2. If you answer the last question in the affirmative, please state the reasons why this rule was not adhered to in the stowage of the "Duc d'Aumale"?

3. Assume that the "Duc d'Aumale's" carrying space capacity was not exhausted, and that she carried proportionately less of each of the same classes of cargo; how would you say in each instance, on the assumption of the reductions undernoted, that the said ship should be stowed:

A. If the quantity of each class of cargo carried was reduced (on a basis of weight) two and one-half per cent?

B. If the quantity of each class of cargo carried was reduced (on a basis of weight) five per cent?

C. If the quantity of each class of cargo carried was reduced (on a basis of weight) seven and one-half per cent?

D. If the quantity of each class of cargo carried was reduced (on a basis of weight) ten per cent?

E. If the quantity of each class of cargo carried was reduced (on a basis of weight) fifteen per cent?

F. If the quantity of each class of cargo carried was reduced (on a basis of weight) twenty per cent?

G. If the quantity of each class of cargo carried was reduced (on a basis of weight) twenty-five per cent?

4. State whether or not it would have been possible to have stowed the "Duc d'Aumale" in a seaworthy manner had her cargo consisted of a greater proportion of pig iron and a less proportion of coke and at the same time the carrying space of the vessel being completely occupied by the cargo carried? If so, please state how many more tons of pig iron and how many less tons of coke could have been carried, and, under such circumstances, how should the vessel have been stowed. In your answer describe the method of stowage of such cargo on such vessel in each instance where the weight of pig iron which was in fact carried by the "Duc d'Aumale" is increased cumulatively by lots of fifty tons.

5. State whether or not it would have been possible to have stowed the "Duc d'Aumale" in a seaworthy manner had her cargo consisted of a greater proportion of coke and a less proportion of pig iron and at the same time the carrying space of the vessel being completely occupied by the cargo carried? If so, how many more tons of coke and how many less tons of pig iron could have been carried, and, under such circumstances, how should the vessel have been stowed? In your answer describe the method of stowage that would be applicable to such cargo of

such vessel in each case where the weight of coke carried more than what the "Duc d'Aumale" did actually carry is increased by lots of fifty tons.

6. If, in answer to direct interrogatory 10, you shall have stated that you know the pumps installed in the "Duc d'Aumale," please give, in detail, on what you base your knowledge of said pumps, and state whether or not, prior to the sailing of said vessel and in the month of August or September, 1907, at the port of Rotterdam, you made any tests or examinations of said pumps, giving the details of such examinations and tests.

(Title of Court and Cause, and Number.)

Answers to Interrogatories by E. Deddes.

Answers to interrogatories propounded to E. Deddes, a witness in the above-entitled action, residing at Rotterdam, taken by Mr. C. A. van Renterghem.

Said witness, being first duly sworn, on oath deposes and says:

In answer to the first interrogatory: Evert Deddes; 73 years old; marine surveyor; member of the Court of Dutch Board of Trade.

To the 2d: Twenty-five years.

To the 3d: I have been mate and master of both sailing and steamships for over 30 years and have also since had a large experience in the stowage of vessels as a surveyor, with all kinds of cargoes; in particular I had experience in stowage of mixed cargoes of pig iron and coke.

To the 4th: I have seen the "Duc d'Aumale" but

have not been on board of her, but I know the type of vessel she is and I have had experience of loading vessels of this type.

To the 5th: My opinion is that the said stowage is a good and efficient one. The ship would be seaworthy as far as stowage is concerned. A well-built ship of the type of the Duc d'Aumale will be able to carry a cargo stowed in this way.

To the 6th: I base my opinion on my own experience.

To the 7th: I do not think there would be any material difference. [71]

To the 8th: I base my opinion on my own experience.

To the 9th: I do not think there would be any material difference.

To the 10th: No.

To the 11th, 12th, 13th, 14th and 15th I cannot answer.

Cross-interrogatories.

To the 1st: There is no such rule. The stowage depends on the beams and lines of the vessel and the nature of the cargo and other particulars in each case.

To the 2d: I cannot answer.

To the 3d: I do not know sufficient of the dimensions of the "Duc d'Aumale" to answer this question.

To the 4th: It would have been possible to carry a little over 330 tons more pig iron and about 40 or 50 tons less of coke, but it would not have been advisable because the vessel would sail better and

easier loaded as she was loaded. If the 330 tons more pig iron were loaded I should put 230 tons in the lower hold and 100 tons in the 'tween-deck and spread the pig iron in the lower hold over a greater length.

To the 5th: I do not believe the "Duc d'Aumale" would be seaworthy with less than 600 tons of pig iron.

To the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th 14th and 15th I cannot answer.

W. S.—E. DEDDES. [72]

(Title of Court and Cause, and Number.)

Interrogatories to be Propounded to Y. de Yonge, at Rotterdam, Holland, on Behalf of Compagnie Maritime Francaise and French Barque "Duc d'Aumale."

1. What is your full name, age and occupation?
2. How long have you been engaged in such occupation?
3. Describe the extent and nature of your experience with sailing vessels, both of wood and of iron, in particular with the surveying, examination and stowage thereof, and more particularly with the stowage of cargoes of coke, and cargoes of pig iron, or mixed cargoes of similar description stowed therein.
4. To what extent are you familiar with the French Barque "Duc d'Aumale"?
5. Please refer to "Respondent's Exhibit 2" and state whether or not you are the person who made and signed the "Survey Report on Stowage," dated Rot-

terdam, the 17th Sept., 1907.

6. Please state if the facts stated in said report are correct, and particularize the extent and result of your examination or examinations of the ship, and especially of the bottom thereof.

7. Please state the condition in which the ship was, as to seaworthiness of structure when she left the port of Rotterdam in September, 1907.

8. Please state the reasons for your opinion as expressed in answer to question 7.

9. Please state your opinion on the seaworthiness, as to stowage, of the "Duc d'Aumale" when she left the port of Rotterdam in September, 1907, adding the reasons for your opinion to your answer.

10. If the stowage of the cargo of the "Duc d'Aumale," as surveyed by you and described in your report of September 17, 1907 (Respondent's Exhibit 2), had been modified in the following respect, viz.: the 600 tons of pig iron in the lower hold had been distributed over the lower hold as follows: one pile in the fore part of the after-hatch, about 350 tons; another pile in the after part of the after-hatch, and a small pile just abaft of the foremast, but otherwise the stowage of the cargo had remained the same: would this modification of the stowage, in your opinion, have been more efficient, or less efficient than the method used when the vessel left Rotterdam in September, 1907?

11. What would have been the comparative effect of the two methods of stowage referred to in questions 9 and 10 upon the straining of the hull and the rolling and pitching of the vessel?

12. Are you familiar with the type of pumps which was installed in the "Duc d'Aumale" at the time of her departure from Rotterdam in September, 1907?

13. If your answer to the preceding question be in the affirmative, please state all the facts within your knowledge, and also your opinion, and the reasons therefor, respecting the efficiency and sufficiency of said pumps; and, if you know, kindly state the condition of said pumps at the time of the vessel's departure from Rotterdam in September, 1907.

Cross-interrogatories to be propounded to Y. de
YONGE.

1. Please state the cubic capacity of the between-decks and the lower hold of the "Duc D'Aumale."

2. If, in answer to the direct interrogatories, you shall have stated that you made an examination of the "Duc D'Aumale" while she was at the port of Rotterdam in August or September, 1907, please state at what place or shipyard in the port of Rotterdam you made such examination, and how far such examination or examinations were made personally by you; please state the exact dates thereof and the names of any and all persons who were present at the time with you; please give the names and addresses of all persons participating in such examination or doing any work on the hull or bottom of the "Duc D'Aumale" during said time.

3. State what was done by you personally to ascertain if the rivets in the hull and bottom of said ship were fast and in good condition.

4. In reference to the stowage of the "Duc D'Aumale" at Rotterdam in September, 1907, will

you state whether or not the cargo carrying capacity of said vessel was completely filled when her loading was completed?

5. Do you not recognize a general rule in relation to the stowage of sailing vessels that two-thirds of weight of the cargo should be stowed in the lower hold and the remaining one-third of weight of cargo in the between-decks?

6. If you answer the last question in the affirmative, please account for the fact that this rule was not adhered to in the case of the stowage of the "Duc D'Aumale."

7. In your judgment, would the stowage of the "Duc D'Aumale" have been better had the iron in the vessel been stowed slightly further forward than it was, namely, at the point in the vessel where her beam is greatest?

8. If you shall have answered the last question in the affirmative, please state why it was that in the case of the "Duc D'Aumale" this was not done.

9. Please state, in detail, the extent of your experience in surveying and examining the hulls and bottoms of iron or steel vessels.

10. Assume that the "Duc D'Aumale's" carrying space capacity was not exhausted, and that she carried proportionately less of each of the same classes of cargo; how would you say in each instance, on the assumption of the reductions undernoted, that the said ship should be stowed:

A. If the quantity of each class of cargo carried was reduced (on a basis of weight) two and one-half per cent?

B. If the quantity of each class of cargo carried was reduced (on a basis of weight) five per cent?

C. If the quantity of each class of cargo carried was reduced (on a basis of weight) seven and one-half per cent?

D. If the quantity of each class of cargo carried was reduced (on a basis of weight) ten per cent?

E. If the quantity of each class of cargo carried was reduced (on a basis of weight) fifteen per cent?

F. If the quantity of each class of cargo carried was reduced (on a basis of weight) twenty per cent?

G. If the quantity of each class of cargo carried was reduced (on a basis of weight) twenty-five per cent?

11. State whether or not it would have been possible to have stowed the "Duc D'Aumale" in a seaworthy manner had her cargo consisted of a greater proportion of pig iron and a less proportion of coke and at the same time the carrying space of the vessel being completely occupied by the cargo carried. If so, please state how many more tons of pig iron and how many less tons of coke could have been carried, and, under such circumstances how should the vessel have been stowed. If your answer describe the method of stowage of such cargo on such vessel in each instance where the weight of pig iron which was in fact carried by the "Duc D'Aumale" is increased cumulatively by lots of fifty tons.

12. State whether or not it would have been possible to have stowed the "Duc D'Aumale" in a seaworthy manner had her cargo consisted of a greater proportion of coke and a less proportion of pig iron

and at the same time the carrying space of the vessel being completely occupied by the cargo carried. If so how many more tons of coke and how many less tons of pig iron could have been carried, and, under such circumstances, how should the vessel have been stowed? In your answer describe the method of stowage that would be applicable to such cargo of such vessel in each case where the weight of coke carried more than what the "Duc D'Aumale" did actually carry is increased by lots of fifty tons.

13. Can you, when you are thoroughly familiar with a vessel, determine in advance the best manner of stowing a vessel in reference to specific quantities and kinds of cargo that it is contemplated the vessel should carry?

14. If you answer the last question in the affirmative, will you please explain why it ever becomes necessary or proper to withhold a parcel of the cargo, as in the case of the "Duc D'Aumale" some sixty tons, for the purpose of trimming the vessel?

15. If, in answer to the direct interrogatories, you have stated that you know the pumps of the "Duc D'Aumale" to have been efficient and sufficient at the time of the vessel's departure from Rotterdam in September, 1907, please state what examination was personally made by you as to the sufficiency and efficiency of the pumps, stating particularly any tests that were made by you of said pumps and the names of all persons present thereat, giving the details of such tests.

(Title of Court and Cause and Number.)

Answers to Interrogatories by Y. de Jonge.

Answers to interrogatories propounded to J. de JONGE, a witness in the above-entitled action, residing at Rotterdam, taken by Mr. C. A. van Renterghem.

Said witness, being first duly sworn, on oath deposes and says:

In answer to the first interrogatory: Yzebrand de Jonge; 52 years old; marine surveyor.

To the 2d: 10 years.

To the 3d: I had a very large experience both with iron and wooden sailing vessels and steamers. I was 27 years at sea, 10 years in sailing vessels in the general trade to Mexico, North America, South America, Argentine, River Plata, South Africa and the Dutch East Indies, and the remaining 17 years in steamers. I became master at the age of 29 years on the steamer "Rhenania" and later on the steamer "Iberia Hispania," all from the same firm Wm. H. Muler & Co. I left this company at the age of 37 years but went to sea again on the steamer "Barendrecht," of the firm of ph. van Ommeren. At the age of 39 this firm sent me to Riga for chartering business and superintending the stowage of their steamers in the general good trade between Riga and Rotterdam. At the age of 41 I began business as a marine surveyor at Rotterdam, in which occupation I have held up to now some 2,000 surveys on river and sea-going craft damages, collisions, stowage of cargoes, in short everything in connection with shipping and often

gave nautical advises to lawyers. After the earthquake of San Francisco a good many sailing vessels left this port with coke, pig iron, cement, girders and other sorts of [73] iron and general goods for San Francisco, Tacoma, Seattle, etc., and Messrs. Wambersie & Son, and Kuyper, van Dam & Smeer, as agents, appointed me to survey the stowage of those ships, for instance, the following ships: Britt. "Riverside," Britt. "Matterhorn," Britt. "Waterloo," Britt. "Altair," Britt. "Alexander Black," Britt. "Crown of Germany," Britt. "Antartic Stream," French barque "Duc d'Aumale," French "Marie Madeline," French "Germaine," Britt. "Cissie," Britt. "Black Breas," Britt. "Hauge-mont," French "General de Negrier," French "Chateau-Briand," and many others.

The "General de Negrier" was loaded with pig iron and coke and all the pig iron was stowed 550 tons in the lower hold and 50 tons in the 'tween-decks, very similar to the "Duc d'Aumale," and all were stowed on the same principle.

To the 4th: I have been several times on board of the French barque "Duc d'Aumale" and I am familiar with her construction and dimensions generally, so far as is required for the purpose of stowing the vessel.

To the 5th: Yes.

To the 6th: Quite correct. The 11th September, 1907, I went on board while the vessel was lying in the Binnenhaven at Rotterdam. The stevedore had just commenced to load coke and so I went down in the holds and found 600 tons of the pig iron stowed

in the lower holds from the after part of the main hatchway to the fore part of the after hatchway covered with Russian mats and deals, and boards were put on top to secure them. So it was well covered and separated from the coke. I had previously arranged the stowage with the master and Mr. Hoogerwerff, who has had very large experience in stowing this class of cargo; we were [74] all satisfied that to stow 600 tons of pig iron in the lower hold and 60 in the 'tween-decks would be perfectly satisfactory. After that I went through the ship and found the decks well caulked, frames, beams and plating was good and as usual, and although I did not inform the age of the vessel, she had the appearance of being a ship of about 8 to 9 years old. I did not examine the bottom. Her rigging was also in good condition, but I did not see the sails. She was a fine model of craft, built after the usual modern dimensions, viz., sufficient beam and stiff enough to shift without ballast.

To the 7th: I went on board again the 18th September, 1907. She was then nearly loaded and as her draft fore and aft was exactly good, it was not necessary to trim her with the 60 tons of pig-iron, so this was covered with mats and boards and remained where it was. The vessel was not down to her marks, and could have loaded more cargo as far as concerns her dead weight, at any rate she had a large freeboard and was lying neatly on the water and perfectly seaworthy. As far as concerns the seaworthiness of the structure, I refer to answer No. 6.

To the 8th: I have, as already stated, had a very long experience of loading cargoes similar to that of the "Duc d'Aumale," and my opinion is based on that experience conferred by Mr. Hoogerwerff and the master.

To the 9th: She was perfectly loaded and as far as concerns the stowage perfectly seaworthy, in fact, the very ship a sailor likes, because such a cargo cannot shift and has a minimum risk for burning, as it produces no gases; and the additional pig iron made the vessel stiff enough [75] to carry sail much better than coke alone which makes a ship too tender, in fact, most sailing vessels loaded with coke alone are obliged to stiffen the vessel with ballast in the bottom at considerable expenses. At the same time she would not be too stiff with only 600 tons in the lower hold.

To the 10th: No, this would have made no practical difference.

To the 11th: The vessel would have been a little stiffer if anything which would add to the rolling, and therefore this would have been a disadvantage.

In my opinion there would be no difference so far as straining is concerned.

To the 12th: No.

To the 13th, 14th and 15th I cannot answer.

Cross-interrogatories.

In answer to the 1st: I do not know.

To the 2d: I refer to my answer to No. 6, direct interrogatories. All my examination and survey was done by myself personally.

To the 3d: Nothing.

To the 4th: The vessel was completely filled, but was not down to the marks.

To the 5th: No.

This all depends upon the stability of the vessel. If a vessel is broad and flat built and has a full form, such a vessel is stiff and [76] requires the weight of the cargo higher up.

On the contrary, if a vessel is narrow and deep, with a fine form, she will be tender and requires the weight of the cargo lower down.

To the 7th: Because the ship would not be in proper trim and would be far too much down by the head. The pig iron was stowed round the main-mast, the strongest part of the vessel.

To the 8th I cannot answer.

To the 9th: I refer to my answer to No. 3, direct interrogatories.

To the 10th: I cannot answer this question with the information at my disposal.

To the 11th: Yes, she could have carried about 1,000 tons of pig iron and a little less than 2,000 tons of coke; 850 tons of pig iron should be stowed in the lower hold and 150 in the 'tween-decks. The 850 tons would have to be loaded about 10 feet further forward and 10 feet further aft than the 600 tons actually loaded.

To the 12th: The "Duc d'Aumale" must have carried at least 500/600 tons of pig iron to make her seaworthy. If only 500/600 tons of pig iron had been loaded, it should all have been stowed in the lower hold in the same place as the 600 tons were actually loaded.

To the 13th: It is the universal practice in stowing cargoes, such as the "Duc d'Aumale" carried to retain a parcel for the purpose of trimming the vessel if this is possible, otherwise it may prove impossible to fill the vessel and keep her proper trim.

To the 14th: The 60 tons was retained quite properly and in the ordinary course [77] but as a matter of fact the trim was quite satisfactory and the 60 tons in the 'tween-decks were not moved.

To the 15th I cannot answer.

W. S.—Y. DE JONGE. [78]

(Title of Court and Cause, and Number.)

Interrogatories to be Pounded to A. van Veen, at Rotterdam, Holland, on Behalf of Compagnie Maritime Francaise and French Barque "Duc d'Aumale."

1. What is your full name, age and occupation?
2. How long have you been engaged in such occupation?

3. Describe the extent and nature of your experience with sailing vessels, both of wood and of iron, in particular with the surveying, examination and stowage thereof, and more particularly with the stowage of cargoes of coke, and cargoes of pig iron, and mixed cargoes of coke and pig iron, or mixed cargoes of similar description stowed therein.

4. To what extent are you familiar with the French barque "Duc d'Aumale"?

5. Are you the person who certified to an official survey of the "Duc d'Aumale" at Rotterdam in September, 1907, on behalf of the Bureau Veritas, and signed Certificate of Classification No. 57,071 as

Inspector, in space No. 2 on the margin thereof as shown in "Respondent's Exhibit 3"?

6. Please state the extent and result of your examination and survey of said vessel before the signing of said certificate, and state the day of the month of September, 1907, on which you made the survey, and on which you signed the certificate.

7. Please state the condition in which the said vessel was, as to seaworthiness in every respect, on the date of your certificate, and on the day of leaving port in September, 1907.

8. If you are acquainted with the stowage of said vessel on her departure from Rotterdam in September, 1907, please state the source of your knowledge of said stowage and give your opinion on the seaworthiness of said vessel with respect to her stowage at the time of her departure from Rotterdam.

9. Suppose said French barque "Duc d'Aumale," 83 meters long in the keel, and 12 meters beam, and of 1,944 35/100 registered tons net, was loaded with 660 tons of pig iron and approximately 2,015 tons of coke, to be carried from Rotterdam around Cape Horn to the port of San Francisco, filling the vessel's entire carrying space, in the following manner: 600 tons of pig iron was stowed in the lower hold over a space about 60 feet long and 30 feet wide, extending from the after part of the main hatch to the fore part of the after hatch; the remaining 60 tons were kept back till the last to trim the vessel and were finally stowed in the between-decks for that purpose; the whole remainder of the space in the hold and between decks was filled with coke, as illustrated in the

diagram marked "Respondent's Exhibit 7": What is your opinion as to the propriety and efficiency of said stowage in said vessel; and what is your opinion as to the seaworthiness of said vessel as far as concern stowage?

10. Please state the reasons for your opinion.

11. If the stowage described in the preceding question had been modified in the following respect, viz: the 600 tons of pig iron in the lower hold had been distributed over the lower hold as follows: one pile in the fore part of the after-hatch, about 350 tons another pile in the after part of the after-hatch, and a small pile abaft of the foremast; but otherwise the stowage of the cargo had been the same; would this modification of the stowage, in your opinion, have been more efficient, or less efficient than the method described in 9?

12. Please state the reasons for your opinion contained in your answer to question 11.

13. Please describe the effect of the first, and the second methods of stowage, respectively, upon the straining of the hull, and the rolling and pitching of the vessel.

14. Are you familiar with the type of pumps which was installed in the "Duc d'Aumale" at the time of her departure from Rotterdam in September, 1907?

15. If your answer to the preceding question be in the affirmative please state all the facts within your knowledge, and also your opinion, and the reasons therefor, respecting the efficiency and sufficiency of said pumps; and, if you know, kindly state

the condition of said pumps at the time of the vessel's departure from Rotterdam in September, 1907.

Cross-Interrogatories to be Propounded to

A. van VEEN.

1. Please state the cubic capacity of the between-decks and the lower hold of the "Duc d'Aumale,"

2. If, in answer to the direct interrogatories, you shall have stated that you made an examination of the "Duc d'Aumale" while she was at the port of Rotterdam in August or September, 1907, please state at what place or shipyard in the port of Rotterdam you made such examination, and how far such examination or examinations were made personally by you; please state the exact dates thereof and the names of any and all persons who were present at the time with you; please give the names and addresses of all persons participating in such examination or doing any work on the hull or bottom of the "Duc d'Aumale" during said time.

3. State what was done by you personally to ascertain if the rivets in the hull and bottom of said ship were fast and in good condition?

4. In reference to the stowage of the "Duc D'Aumale" at Rotterdam in September, 1907, will you state whether or not the cargo carrying capacity of said vessel was completely filled when her loading was completed?

5. Do you not recognize a general rule in relation to the stowage of sailing vessels that two-thirds of weight of the cargo should be stowed in the lower

hold and the remaining one-third of weight of cargo in the between-decks?

6. If you answer the last question in the affirmative, please account for the fact that this rule was not adhered to in the case of the stowage of the "Duc D'Aumale."

7. In your judgment would the stowage of the "Duc D'Aumale" have been better had the iron in the vessel been stowed slightly further forward than it was, namely, at the point in the vessel where her beam is greatest?

8. If you shall have answered the last question in the affirmative, please state why it was that in the case of the "Duc D'Aumale" this was not done.

9. Please state, in detail, the extent of your experience in surveying and examining the hulls and bottoms of iron or steel vessels.

10. Assume that the "Duc D'Aumale's" carrying space capacity was not exhausted, and that she carried proportionately less of each of the same classes of cargo; how would you say in each instance, on the assumption of the reductions undernoted, that the said ship should be stowed:

A. If the quantity of each class of cargo carried was reduced (on a basis of weight) two and one-half per cent?

B. If the quantity of each class of cargo carried was reduced (on a basis of weight) five per cent?

C. If the quantity of each class of cargo carried was reduced (on a basis of weight) seven and one-half per cent?

D. If the quantity of each class of cargo carried

was reduced (on a basis of weight) ten per cent?

E. If the quantity of each class of cargo carried was reduced (on a basis of weight) fifteen per cent?

F. If the quantity of each class of cargo carried was reduced (on a basis of weight) twenty per cent?

G. If the quantity of each class of cargo carried was reduced (on a basis of weight) twenty-five per cent?

11. State whether or not it would have been possible to have stowed the "Duc D'Aumale" in a seaworthy manner had her cargo consisted of a greater proportion of pig iron and a less proportion of coke and at the same time the carrying space of the vessel being completely occupied by the cargo carried. If so, please state how many more tons of pig iron and how many less tons of coke could have been carried, and, under such circumstances, how should the vessel have been stowed. In your answer describe the method of stowage of such cargo on such vessel in each instance where the weight of pig iron which was in fact carried by the "Duc D'Aumale" is increased cumulatively by lots of fifty tons.

12. State whether or not it would have been possible to have stowed the "Duc D'Aumale" in a seaworthy manner had her cargo consisted of a greater proportion of coke and a less proportion of pig iron and at the same time the carrying space of the vessel being completely occupied by the cargo carried. If so, how many more tons of coke and how many less tons of pig iron could have been carried, and, under such circumstances, how should the vessel have been

stowed? In your answer describe the method of stowage that would be applicable to such cargo of such vessel in each case where the weight of coke carried more than what the "Duc D'Aumale" did actually carry is increased by lots of fifty tons.

13. Can you, when you are thoroughly familiar with a vessel, determine in advance the best manner of stowing a vessel in reference to specific quantities and kinds of cargo that it is contemplated the vessel should carry?

14. If you answer the last question in the affirmative, will you please explain why it ever becomes necessary or proper to withhold a parcel of the cargo, as in the case of the "Duc D'Aumale" some sixty tons, for the purpose of trimming the vessel?

15. If, in answer to the direct interrogatories, you have stated that you know the pumps of the "Duc D'Aumale" to have been efficient and sufficient at the time of the vessel's departure from Rotterdam in September, 1907, please state what examination was personally made by you as to the sufficiency and efficiency of the pumps, stating particularly any tests that were made by you of said pumps and the names of all persons present thereat, giving the details of such tests?

(Title of Court and Cause and Number.)

Answers to Interrogatories by A. Van Veen.

Answers to interrogatories propounded to A. Van Veen, a witness in the above-entitled action, residing at Rotterdam, taken by Mr. C. A. van Renterghem.

Said witness, being first duly sworn, on oath deposes and says:

In answer to the first interrogatory: Aart Van Veen; age, 46 years; inspector for the Bureau Veritas for the Rotterdam District.

To the 2d: I have been surveyor to the Bureau Veritas, both ship and engineer, for 16 years and 10 years inspector. I studied engineering and naval architecture at the Technical University of Delft and subsequently was for 2 years with the Fairfield Ship Building Co., and after that for some years I was marine superintendent at Rotterdam of various steamship companies, for instance, the Holland American Line.

To the 3d: As surveyor to the Bureau Veritas I have been for the past 16 years constantly engaged in surveying and examining the hull and the equipment of sailing vessels, both of wood and iron. A very large number of sailing vessels are classed with The Bureau Veritas, but I have not done much surveying of stowage of cargoes of late years.

To the 4th: I thoroughly examined and surveyed the hull of the "Duc d'Aumale" in drydock at Rotterdam on the 6th September, 1907, for classification purposes.

To the 5th: Yes. [79]

To the 6th: I examined the whole of the hull of the vessel and in particular the bottom with all butts, seams, and rivets and the rudder. I found the whole after-hull in excellent condition with exception that I found 2 rivets corroded and these were renewed and the rudder rebushed. The bottom of the ship was cleaned and painted. I made the examination

on the 6th September, 1907, but I do not remember on what day I signed the certificate, but it was in the month of September, 1907, after holding the survey.

To the 7th: On the day I signed the certificate the "Duc d'Aumale" was seaworthy in every respect. I did not see her on the day of leaving Rotterdam in September, 1907, but unless some casualty happened to the vessel after I saw her, she must have been seaworthy then.

To the 8th: I do not know anything of the stowage of the vessel.

To the 9th: I know that this method of stowing was and still is the usual method of stowing vessels of the type of the "Duc d'Aumale," with such a cargo. Mr. A. A. Hoogerwerff, who stowed the "Duc d'Aumale," has had a very large experience of stowing such cargoes in similar vessels, and I am sure that he would not stow such a cargo improperly.

To the 10th: I refer to my answer to the 9th.

To the 11th, 12th and 13th: I have not the information required to make the necessary calculations.

To the 14th and 15th: No. [80]

Cross-interrogatories.

To the 1st: I do not know the cubic capacity of the between-decks and the lower hold of the "Duc d'Aumale" now.

To the 2d: The "Duc d'Aumale" was lying in a drydock of the Rotterdam Dry Dock Company when I examined the "Duc d'Aumale. I did the whole examination and survey personally on the 6th of September, 1907, in presence of Mr. Plisson, a representative of the owners, and Mr. Van den Berg, assist-

ant manager of the drydock company.

To the 3d: I examined the rivets in the hull and bottom by going along the ship and under the bottom, and it is quite easy to see whether the rivets are sound or not.

To the 4th: I do not know this.

To the 5th and 6th: I do not recognize any such universal rule. The stowage must depend in each case on the nature of the cargo, the beam of the vessel, the rigging and other similar circumstances.

To the 7th and 8th: I have not sufficient particulars of the "Duc d'Aumale" to answer this question, to stow the pig iron further forward would alter the trim of the vessel considerably.

To the 9th: As surveyor for the Bureau of Veritas, it has been my daily occupation for the past 16 years to survey and examine hulls and bottoms of iron and steel vessels.

To the 10th, 11th, 12th, 13th and 14; I have not the particulars necessary to answer these questions, but I [81] know that it is the usual practice in stowing such a cargo at Rotterdam to retain a parcel of the heavy cargo for the purpose of trimming the vessel, and in my opinion this is a proper thing to do.

To the 15th I cannot answer.

W. S.—A. VAN VEEN. [82]

(Title of Court and Cause, and Number.)

Interrogatories to be Propounded to — Hagedyk, Foreman of the Firm of Rotterdamsche Droogdok Maatschappij, at Rotterdam, Holland, and Any Officer or Foreman of Said Company Who may be Called as a Witness Before the Commissioner on Behalf of Compagnie Maritime Francaise and French Barque “Duc d’Aumale.”

1. What is your full name, age, and occupation?
2. How long have you been engaged in such occupation, in general, and in particular for the Rotterdamsche Droogdok Maatschappij?

3. Please state whether or not, to your knowledge, the French Barque “Duc d’Aumale” was in drydock in Rotterdam in or about September, 1907.

4. If your answer to the preceding question is that she was, please state, on what days she was in the drydock, and please state, also, in detail, what, if anything, was done by you, or under your personal supervision, on the hull, and in particular on the bottom of said vessel, in the way of examination of hull or bottom, and also in the way of repairs made thereon.

5. If any rivets were renewed while the ship was in drydock, describe the location of said rivets.

6. If you made a personal examination of her hull or bottom, or either thereof, state any detail of such examination tending to show the extent or thoroughness of such examination; also state, whether or not all the defects discovered by you were repaired within your knowledge.

7. State your opinion as to the navigability or seaworthiness of the "Duc d'Aumale" for a deep sea voyage, after all repairs made in your drydock had been completed.

Cross-interrogatories to be propounded to — Hagendyk, foreman of the firm of Rotterdamsche Droogdok Maatschappij, at Rotterdam, Holland, and any officer or manager of said company who may be called as a witness before the Commissioner on behalf of Compagnie Maritime Francaise.

1. If, in answer to the direct interrogatories, you shall have stated that something was done by you, or under your personal supervision, on the hull and on the bottom of the "Duc D'Aumale" in the way of examination in September, 1907, at Rotterdam, please state, in detail, the nature of the examination that was made.

2. Please state whether said examination was particularly directed to determining the condition of the rivets in the hull, particularly in the bottom of said vessel.

3. Please state what part was played by you personally in the matter of making such examination of the hull, particularly the bottom of said vessel.

4. Will you swear that you personally examined each rivet in the hull of the "Duc D'Aumale" and handled same?

5. State precisely what personal act or acts you performed as to each rivet examined by you, which constituted your examination of such rivet.

6. Is it not a fact that, as well before as since the making of repairs on the "Duc D'Aumale" in the

port of Rotterdam in September, 1907, you have frequently performed work for Compagnie Maritime Francaise on their vessels and that you regard said company as a customer of yours?

(Title of Court and Cause and Number.)

Answers to Interrogatories by J. van den Berg.

Answers to interrogatories propounded to J. H. v. d. Berg, a witness in the above-entitled action, residing at Rotterdam, taken by Mr. C. A. van Renterghem.

Said witness, being first duly sworn, on oath deposes and says:

In answer to the first interrogatory: Jan Hendrik van den Berg; 33 years old; Naval Architect, Assistant Manager of the Rotterdam Droogdok Maatschappij.

To the 2d: I have been engaged in this occupation about ten years and 4½ by the Droogdok Maatschappij. I had learned this business at several of the biggest shipbuilding yards in Holland (f. i. Feye-noord, where so some dutch men-of-war have been built.)

To the 3d: Yes, I don't remember personally but I have seen it in the books.

To the 4th: I personally always examine all the vessels that come in the Droogdok Maatschappij. Because the "Duc d'Aumale" was there in September, 1907, according to the books I must have examined her myself. After the books the bottom and hull have been carefully examined also by my staff of workmen. All rivets suspected to be bad have been

marked and were tested afterwards; two of them were renewed, the rest proved to be sound. The vessel was also cleaned and repainted and the rudder lifted and the rudder-bushes renewed.

To the 5th: After the books two rivets were renewed in the bottom, but I could not see in what part of the bottom. [83]

To the 6th: As I have stated, according to the books I must have personally inspected the bottom and hull and marked all rivets and spots that were suspected to be bad. As the costs of repairs include a larger profit for our company than dock rent, we always inspect ships very accurately. All defects discovered must have been repaired, because this is always done.

To the 7th: As I have said already, I don't remember personally any more whether the "Duc d'Aumale" at the moment of her departure was seaworthy. As I examine all vessels personally as to the rivets, rudder, plates and the hull, the ship at the moment of her departure must have been seaworthy for a deep sea voyage as far as the hull is concerned. I do not know anything about navigability.

To the 8th, 9th, 10th, 11th, 12th, 13th 14th and 15th I cannot answer.

Cross-Interrogatories.

To the 1st: I refer my answers 4-6 of the direct interrogatories.

To the second: According to the books the examination was directed to determining the condition of the bottom hull, the rivets included, but not particularly to determining the condition of the rivets only.

To the 3d: I always personally examine the whole

bottom and hull and order my staff to test the rivets and spots, which I suspect to be bad. These rivets and spots are tested in the usual way, *a. e.*, by knocking with a hammer. [84]

To the 4th: No.

To the 5th: The condition of the rivets can be ascertained by looking at them; this I do always. I order my staff to test all of them which appear to be doubtful.

To the 6th: We probably have had vessels of said company before, because we have had in drydock vessels of nearly all shipping companies who have ships going to Rotterdam from time to time.

I cannot tell this with certainty, because I don't know at this moment whether the owners of the "Duc d'Aumale" have still more ships, but I will ascertain it from my books and write about this point to the commissioner under oath.

w. s.—J. H. v. d. BERG.

The letter of J. H. v. d. Berg meant in the answer to the 6th question; the diagram countersigned by me (Respondent's Exhibit 7), the certificate of classification No. 57,071 (Respondent's Exhibit 3), countersigned by me, and the Survey Report on Stowage (Respondent's Exhibit 2), also countersigned by me, are affixed here.

Rotterdam, 1st September, 1910.

Mr. C. A. v. RENTERGHEM.

[Endorsed]: Opened and filed Feby. 16th, 1911.
Jas. P. Brown, Clerk. By M. T. Scott, Deputy Clerk.
[85]

(Title of Court and Cause, and Number.)

**Stipulation (Re Taking of Depositions of E. Plisson
et al.)**

It is hereby stipulated and agreed by and between the parties hereto and their respective proctors that the depositions of E. Plisson, C. Girard, D. Beaudry and E. Le Roy, all witnesses called on behalf of claimant, may be taken at the city of Nantes, in the Republic of France, before Ch. Ed., Simon, doyen, 33 Quai Fosse, Nantes, magistrate and sworn broker in said city, as commissioner, or such other person authorized to administer oaths as he may select for the office, without the issuance of a commission for the purpose, upon this stipulation, and upon the interrogatories, direct and cross, annexed hereto.

That said commissioner be authorized, if necessary, to appoint a competent interpreter and a stenographic reporter who shall take down and transcribe the answers to said interrogatories, direct and cross; and when said depositions are taken, the same shall be returned to the clerk of the above-entitled court, with the said commissioner's certificate thereto, in the form hereto attached.

When so taken and returned, said depositions may be offered and read in evidence, in the above-entitled case, and also in the case of *Compagnie Maritime Francaise vs. The Cargo of the French Barque "Duc d'Aumale,"* No. 1395, subject to any objections thereto, except as to the form of the interrogatories or the method of taking said depositions.

It is further stipulated that Respondent's Exhibits

1 [86] and 7, being part of the depositions of Pierre Lalande, taken heretofore on behalf of the respondent in this case, may be annexed to the interrogatories and cross-interrogatories to be sent to the aforementioned commissioner, for the purpose of being used upon the taking of said depositions.

Dated San Francisco, California, July 28th, 1909.

PAGE, McCUTCHEN & KNIGHT,

Proctors for ———.

ANDROS & HENGSTLER,

Proctors for Claimant.

(Commissioner's Mark.)

(Here follows three (3) pages, written in the French language, which are omitted, pursuant to order of Court, dated June 14, 1917.) [87]

(Title of Court and Cause, and Number.)

Interrogatories to be Propounded to E. Plisson, at Nantes, France, on Behalf of Compagnie Maritime Francaise and French Barque "Duc d'Aumale."

1. What is your full name, age and occupation?
2. How long have you been engaged in this occupation?
3. Describe the extent and nature of your experience with sailing vessels, both of wood and iron, in particular with the surveying examination and stowage thereof, and more particularly with the stowage of cargoes of coke, and cargoes of pig iron, and mixed cargoes of coke and pig iron, or mixed cargoes of similar description stowed therein.

4. To what extent are you familiar with the French barque "Duc d'Aumale"?

5. Please give the dimensions and carrying capacity of the "Duc d'Aumale."

6. Please give a detailed description of the examination or examinations of the "Duc d'Aumale" made by you personally or at which you assisted, in August or September, 1907, while she was in the port of Rotterdam, with special reference to her structural seaworthiness and more particularly to the condition of her hull and bottom.

7. Please state what repairs, within your knowledge, were made on the hull, and particularly on the bottom of the vessel during August or September, 1907.

8. Please state your opinion, as to the structural seaworthiness of said vessel when she left the port of Rotterdam in September, 1907; and give the reasons for your opinion. [88]

9. What, if anything, had you to do with the stowing of the cargo of said vessel at Rotterdam, in September, 1907?

10. Please inspect Respondent's Exhibit 7 and state if it gives a correct representation of the stowage of the vessel. State who prepared said plan and state anything within your knowledge in explanation or correction of said plan. Give dimensions of piles of pig iron and distances from hatches.

11. Please state in detail what personal care or supervision, if any, you gave to the work of stowing said cargo.

12. Please state your opinion as to the propriety

and efficiency of the stowage of said vessel, as it was actually made, and give the reasons for your opinion.

13. If the stowage of the vessel, as it was when she left Rotterdam in September, 1907, had been modified in the following respect, viz., the 600 tons of pig iron in the lower hold had been distributed over the lower hold as follows: One pile in the fore part of the after-hatch, about 350 tons; another pile in the after part of the after hatch, and a small pile abaft of the foremast; but otherwise the stowage of the cargo had been the same; would this modification of the stowage, in your opinion, have been more efficient, or less efficient than the method used when the vessel left Rotterdam in September, 1907?

14. Give your reasons for your opinion as expressed in answer to question 13.

15. Would it have been desirable, in the case of this vessel and this cargo, to have spread the 660 tons of pig iron in the lower hold of the vessel over a larger ground space of said hold?

16. Give your reasons for your opinions as expressed in answer to question 15. [89]

17. Please state why, in the stowage of the cargo of this vessel, the weights carried in the between-decks and in the lower hold, were distributed as they actually were?

18. Was the distribution of the weights, actually made, in accordance with the rules of good stowage?

19. State reasons for answer to question 18.

20. Please compare the effect of the distribution of the cargo of the "Duc d'Aumale," when she left Rotterdam on her voyage to San Francisco in Sep-

tember, 1907, with respect to straining of the hull, and the rolling and pitching of the vessel, with the effect which the spreading of the 600 tons in the lower hold over a larger area would have had in the same respects, and also with the effect which a different distribution of weights, as between-hold and between-decks would have had in the same respects.

21. Are you familiar with the type of pumps which was installed in the "Duc d'Aumale" at the time of her departure from Rotterdam in September, 1907?

22. If your answer to the preceding question be in the affirmative, please state all the facts within your knowledge, and also your opinion, and the reasons therefor, respecting the efficiency and sufficiency of said pumps; and, if you know, kindly state the condition of said pumps at the time of the vessel's departure from Rotterdam in September, 1907.

Cross-Interrogatories to be Propounded to E.

PLISSON.

1. If you have not already done so in answer to the direct interrogatories, will you please state whether it is not the fact that you are now an employee of Compagnie Maritime Francaise and were such employee at all time in August and September, 1907? [90]

2. If you shall answer the last question in the affirmative, please describe precisely your duties under such employment.

3. Please state the cubic capacity of the between-decks and the lower hold of the "Duc d'Aumale."

4. If in answer to the direct interrogatories, you shall have stated that you made an examination of

the "Duc D'Aumale" while she was at the port of Rotterdam in August or September, 1907, please state at what place or shipyard in the Port of Rotterdam you made such examination, and how far such examination or examinations were made personally by you; please state the exact dates thereof and the names of any and all persons who were present at the time with you; please give the names and addresses of all persons participating in such examination or doing any work on the hull or bottom of the "Duc D'Aumale" during said time.

5. State what was done by you personally to ascertain if the rivets in the hull and bottom of said ship were fast and in good condition.

6. In reference to the stowage of the "Duc D'Aumale" at Rotterdam in September, 1907, will you state whether or not the cargo carrying capacity of said vessel was completely filled when her loading was completed?

7. Do you not recognize a general rule in relation to the stowage of sailing vessels that two-thirds of weight of the cargo should be stowed in the lower hold and the remaining one-third of weight of cargo in the between-decks?

8. If you answer the last question in the affirmative, please account for the fact that this rule was not adhered to in the case of the stowage of the "Duc D'Aumale"?

9. In your judgment, would the stowage of the "Duc D'Aumale" have been better had the iron in the vessel been stowed slightly further forward than

it was, namely, at the point in the vessel where her beam is greatest? [91]

10. If you shall have answered the last question in the affirmative, please state why it was that in the case of the "Duc D'Aumale" this was not done.

11. Please state, in detail, the extent of your experience in surveying and examining the hulls and bottoms of iron or steel vessels.

12. Assume that the "Duc D'Aumale's" carrying space capacity was not exhausted, and that she carried proportionately less of each of the same classes of cargo; how would you say, in each instance, on the assumption of the reductions undernoted, that the said ship should be stowed:

A. If the quantity of each class of cargo carried was reduced (on a basis of weight) two and one-half per cent?

B. If the quantity of each class of cargo carried was reduced (on a basis of weight) five per cent?

C. If the quantity of each class of cargo carried was reduced (on a basis of weight) seven and one-half per cent?

D. If the quantity of each class of cargo carried was reduced (on a basis of weight) ten per cent?

E. If the quantity of each class of cargo carried was reduced (on a basis of weight) fifteen per cent?

F. If the quantity of each class of cargo carried was reduced (on a basis of weight) twenty per cent?

G. If the quantity of each class of cargo carried was reduced (on a basis of weight) twenty-five per cent?

13. State whether or not it would have been pos-

sible to have stowed the "Duc D'Aumale" in a seaworthy manner had her cargo consisted of a greater proportion of pig iron and a less proportion of coke and at the same time the carrying space of the vessel being completely occupied by the cargo carried? If so, [92] please state how many more tons of pig iron and how many less tons of coke could have been carried, and under such circumstances how should the vessel have been stowed? In your answer describe the method of stowage of such cargo on such vessel in each instance where the weight of pig iron which was in fact carried by the "Duc D'Aumale" is increased cumulatively by lots of fifty tons.

14. State whether or not it would have been possible to have stowed the "Duc D'Aumale" in a seaworthy manner had her cargo consisted of a greater proportion of coke and a less proportion of pig iron and at the same time the carrying space of the vessel being completely occupied by the cargo carried. If so, how many more tons of coke and how many less tons of pig iron could have been carried, and, under such circumstances, how should the vessel have been stowed? In your answer describe the method of stowage that should be applicable to such cargo of such vessel in each case where the weight of coke carried more than what the "Duc D'Aumale" did actually carry is increased by lots of fifty tons.

15. Can you, when you are thoroughly familiar with a vessel, determine in advance the best manner of stowing a vessel in reference to specific quantities and kinds of cargo that it is contemplated the vessel should carry?

16. If you answer the last question in the affirmative, will you please explain why it ever becomes necessary or proper to withhold a parcel of the cargo, as in the case of the "Duc D'Aumale" some sixty tons, for the purpose of trimming the vessel?

17. If in answer to the direct interrogatories you have stated that you know the pumps of the "Duc D'Aumale" to have been efficient and sufficient at the time of the vessel's departure from Rotterdam in September, 1907, please state what examination was [93] personally made by you as to the sufficiency and efficiency of the pumps, stating particularly any tests that were made by you of said pumps and the names of all persons present thereat, giving the details of such tests. [94]

(Title of Court and Cause, and Number.)

**Interrogatories to be Propounded to C. Girard, at
Nantes, France, on Behalf of Compagnie Mari-
time Francaise and French Barque "Duc
d'Aumale."**

1. What is your full name, age and occupation?
2. How long have you been engaged in this occupation?

3. Describe the extent and nature of your experience with sailing vessels, both of wood and of iron, in particular with the surveying, examination and stowage thereof, and more particularly with the cargoes of coke and pig iron, or mixed cargoes of similar description stowed therein.

4. To what extent are you familiar with the French Barque "Duc d'Aumale?"

5. Please give a detailed description of the examination or examinations of the "Duc d'Aumale" made by you personally or at which you assisted, in August or September, 1907, while she was in the port of Rotterdam, with special reference to her structural seaworthiness and more particularly to the condition of her hull and bottom.

6. Please state what repairs, within your knowledge, were made on the hull, and particularly on the bottom of the vessel during August or September, 1907.

7. What, if anything, had you to do with the stowing of the cargo of said vessel at Rotterdam, in September, 1907?

8. Suppose said French barque "Duc d'Aumale," 83 meters long in the keel, and 12 meters beam, and of 1944 35/100 registered tons net, was loaded with 660 tons of pig iron and approximately 2015 [95] tons of coke, to be carried from Rotterdam around Cape Horn, to the port of San Francisco, filling the vessel's entire carrying space, in the following manner; 600 tons of pig iron was stowed in the lower hold over a space about 60 feet long and 30 feet wide, extending from the after part of the main hatch to the fore part of the after hatch; the remaining 60 tons were kept back till the last to trim the vessel and were finally stowed in the between-decks for that purpose; the whole remainder of the space in the hold and between-decks was filled with coke, as illustrated in the diagram marked "Respondent's Exhibit 7": What is your opinion as to the propriety and efficiency of said stowage in said vessel and what

is your opinion as to the seaworthiness of said vessel as far as concerns stowage?

9. Please state the reasons for your opinion.

10. If the stowage described in the preceding question had been modified in the following respect, viz: the 600 tons of pig iron in the lower hold had been distributed over the lower hold as follows: One pile in the fore part of after hatch, about 350 tons; another pile in the after part of the after hatch, and a small pile abaft of the foremast; but otherwise the stowage of the cargo had been the same: would this modification of the stowage in your opinion, have been more efficient, or less efficient than the method described in question 8?

11. Please state the reasons for your opinion contained in your answer to question 10.

12. Please describe the effect of the first, and the second, methods of stowage, respectively, upon the straining of the hull, and the rolling and pitching of the vessel.

13. Do you know the pumps installed in the "Duc d'Aumale"?

14. If you answer the preceding question in the affirmative, [96] state how the pumps compare with pumps used on vessels of the same type, and state your opinion as to the sufficiency and efficiency thereof.

15. Are you the person who, on behalf of the Compagnie Maritime Francaise, on August 27, 1907, signed the request, addressed to the French Consul at Rotterdam, to appoint two experts to proceed to a survey of seaworthiness of the "Duc d'Aumale,"

as shown in Respondent's Exhibit 1? Please read the exhibit and state whether it contains a correct copy of your said request.

16. Please state whether, within your knowledge, two experts, appointed by the French Consul at Rotterdam, surveyed the "Duc d'Aumale" at or soon after your request was made, and state the names of the two experts.

17. Please state what assistance, if any, you gave to the said two experts at the survey of said vessel.

Cross-interrogatories to be Propounded to C.
GIRARD.

1. If you have not already done so in answer to the direct interrogatories, will you please state whether it is not the fact that you are now an employee of Compagnie Maritime Francaise and were such employee at all time in August and September, 1907.

2. If you shall answer the last question in the affirmative, please describe precisely your duties under such employment.

3. Please state the cubic capacity of the between-decks and the lower hold of the "Duc d'Aumale"?

4. If in answer to the direct interrogatories you shall have stated that you made an examination of the "Duc d'Aumale" while she was at the port of Rotterdam in August or September, 1907, please state at what place or shipyard in the port of Rotterdam [97] you made such examination, and how far such examination or examinations were made by you personally; please state the exact dates thereof and the names of any and all persons who were pres-

ent at the time with you; please give the names and addresses of all persons participating in such examination or doing any work on the hull or bottom of the "Duc d'Aumale" during said time.

5. State what was done by you personally to ascertain if the rivets in the hull and bottom of said ship were fast and in good condition.

6. In reference to the stowage of the "Duc d'Aumale" at Rotterdam in September, 1907, will you state whether or not the cargo carrying capacity of said vessel was completely filled when her loading was completed.

7. Do you not recognize a general rule in relation to the stowage of sailing vessels that two-thirds of weight of the cargo should be stowed in the lower hold and the remaining one-third of weight of cargo in the between-decks?

8. If you answer the last question in the affirmative, please account for the fact that this rule was not adhered to in the case of the stowage of the "Duc d'Aumale."

9. In your judgment, would the stowage of the "Duc D'Aumale" have been better had the iron in the vessel been stowed slightly further forward than it was, namely, at the point in the vessel where her beam is greatest?

10. If you shall have answered the last question in the affirmative, please state why it was that in the case of the "Duc D'Aumale" this was not done.

11. Please state, in detail, the extent of your experience in surveying and examining the hulls and bottoms of iron or steel vessels?

12. Assume that the "Duc D'Aumale's" carrying space capacity was not exhausted, and that she carried proportionately less of each [98] of the same classes of cargo; how would you say in each instance, on the assumption of the reductions undernoted, that the said ship should be stowed:

A. If the quantity of each class of cargo carried was reduced (on a basis of weight) two and one-half per cent?

B. If the quantity of each class of cargo carried was reduced (on a basis of weight) five per cent?

C. If the quantity of each class of cargo carried was reduced (on a basis of weight) seven and one-half per cent?

D. If the quantity of each class of cargo carried was reduced (on a basis of weight) ten per cent?

E. If the quantity of each class of cargo carried was reduced (on a basis of weight) fifteen per cent?

F. If the quantity of each class of cargo carried was reduced (on a basis of weight) twenty per cent?

G. If the quantity of each class of cargo carried was reduced (on a basis of weight) twenty-five per cent?

13. State whether or not it would have been possible to have stowed the "Duc D'Aumale" in a seaworthy manner had her cargo consisted of a greater proportion of pig iron and a less proportion of coke and at the same time the carrying space of the vessel being completely occupied by the cargo carried? If so, please state how many more tons of pig iron and how many less tons of coke could have been carried, and, under such circumstances, how

should the vessel have been stowed. In your answer describe the method of stowage of such cargo on such vessel in each instance where the weight of pig iron which was in fact carried by the "Duc D'Aumale" is increased cumulatively by lots of fifty tons.

14. State whether or not it would have been possible to have stowed the "Duc D'Aumale" in a seaworthy manner had her cargo [99] consisted of a greater proportion of coke and a less proportion of pig iron and at the same time the carrying space of the vessel being completely occupied by the cargo carried? If so, how many more tons of coke and how many less tons of pig iron could have been carried, and, under such circumstances, how should the vessel have been stowed? In your answer describe the method of stowage that would be applicable to such cargo of such vessel in each case where the weight of coke carried more than what the "Duc D'Aumale" did actually carry is increased by lots of fifty tons.

15. Can you, when you are thoroughly familiar with a vessel, determine in advance the best manner of stowing a vessel in reference to specific quantities and kinds of cargo that it is contemplated the vessel should carry?

16. If you answer the last question in the affirmative, will you please explain why it ever becomes necessary or proper to withhold a parcel of the cargo, as in the case of the "Duc D'Aumale" some sixty tons, for the purpose of trimming the vessel?

17. If, in answer to the direct interrogatories, you have stated that you know the pumps of the "Duc D'Aumale" to have been efficient and sufficient

at the time of the vessel's departure from Rotterdam in September, 1907, please state what examination was personally made by you as to the sufficiency and efficiency of the pumps, stating particularly any tests that were made by you of said pumps and the names of all persons present thereat, giving the details of such tests.

18. If, in answer to the 16th interrogatory, you shall have stated that two experts were appointed by the French Consul at Rotterdam to survey the "Duc D'Aumale" and who surveyed said vessel, please state what you know of the qualifications of said persons you call experts.

19. Please state, in detail, the extent of your experience in surveying and examining hulls and bottoms of iron or steel vessels. [100]

(Title of Court and Cause, and Number.)

Interrogatories to be Propounded to Capt. D. Beaudry, at Nantes, France, on Behalf of Compagnie Maritime Francaise and French Barque "Duc d'Aumale."

1. What is your name, age and occupation?
2. How long have you been engaged in such occupation?
3. Please describe the nature and extent of your experience with deep sea vessels.
4. Please describe the extent of your experience in surveying vessels to seaworthiness.
5. Did you, in August or September, 1907, at the port of Rotterdam, Holland, go on board the French

barque "Duc d'Aumale"? If your answer be yes, state the occasion and purpose of your visit.

6. If your answer to the preceding question be that you went on board the French barque "Duc d'Aumale" at the request of the French Consul at Rotterdam, state in detail what was done by you while you were on board.

7. State when you *when you* went on board, and who was present and assisted upon that occasion.

8. If on that occasion, you made a survey of the "Duc d'Aumale," describe the details of the survey, and the particularity and degree of care with which your examination was made.

9. Please state the result of your examination, and the opinion which you formed after the examination with respect to the seaworthiness of the "Duc d'Aumale."

10. Are you the person who signed the Survey Report, a copy whereof is contained in Respondent's Exhibit 1? [101]

11. Please read the copy of the survey report contained in Respondent's Exhibit 1 and state whether it is a correct copy of the original report certified to by you on the subject of the seaworthiness of the "Duc d'Aumale."

Cross-interrogatories to be propounded to D.

BEAUDRY.

1. If, in answer to the direct interrogatories, you have stated, directly or in effect, that you have had experience in surveying vessels as to seaworthiness, please give the names of any and all vessels you have surveyed for this purpose, with the times and places

thereof, stating, in each case, whether such vessels were iron or wooden ships.

2. State whether or not on any such occasions you found and reported rivets in the hull or bottom of an iron vessel to be in bad condition, stating the name of the vessel in each case and the time and place where such survey was made.

3. If, in answer to the direct interrogatories, you shall have stated that you went on board the French bark "Duc D'Aumale" in August or September, 1907, at the port of Rotterdam, for the purpose of surveying the hull of said vessel as to seaworthiness, please state whether such vessel at said time was in drydock.

4. Please state, if at this or any other time you made a survey of the hull of the "Duc D'Aumale" precisely what was done by you personally to ascertain the condition of the rivets throughout the hull of said vessel.

5. Will you state under oath that you personally examined each rivet in the hull of the "Duc D'Aumale" and handled same?

6. State precisely what personal act or acts you performed as to each rivet examined by you and which constituted your examination of such rivet.
[102]

7. Please state whether or not you have had any experience in surveying the hulls of vessels other than such as is incidental to your occupation as a master or officer of ships, and, if so, the details of that experience. [103]

(Title of Court and Cause, and Number.)

**Interrogatories to be Propounded to Capt. E. Le Roy,
at Nantes, France, on Behalf of Compagnie
Maritime Francaise and French Barque "Duc
d'Aumale."**

1. What is your name, age and occupation?
2. How long have you been engaged in such occupation?
3. Please describe the nature and extent of your experience with deep sea vessels.
4. Please describe the extent of your experience in surveying vessels as to seaworthiness.
5. Did you, in August or September, 1907, at the port of Rotterdam, Holland, go on board the French barque "Duc d'Aumale"? If your answer be yes, state the occasion and purpose of your visit.
6. If your answer to the preceding question be that you went on board the French barque "Duc d'Aumale" at the request of the French Consul at Rotterdam, state in detail what was done by you while you were on board.
7. State when you went on board, and who was present and assisted upon that occasion.
8. If on that occasion, you made a survey of the "Duc d'Aumale," describe the details of the survey, and the particularity and degree of care with which your examination was made.
9. Please state the result of your examination, and the opinion which you formed after the examina-

tion with respect to the seaworthiness of the "Duc d'Aumale."

10. Are you the person who signed the Survey Report, a copy whereof is contained in Respondent's Exhibit 1? [104]

11. Please read the copy of the survey report contained in Respondent's Exhibit 1 and state whether it is a correct copy of the original report certified to by you on the subject of the seaworthiness of the "Duc d'Aumale."

Cross-interrogatories to be Propounded to E. LE ROY.

1. If, in answer to the direct interrogatories, you have stated, directly or in effect, that you have had experience in surveying vessels as to seaworthiness, please give the names of any and all vessels you have surveyed for this purpose, with the times and places thereof, stating, in each case, whether such vessels were iron or wooden ships.

2. State whether or not on any such occasions you found and reported rivets in the hull or bottom of an iron vessel to be in bad condition, stating the name of the vessel in each case and the time and place where such survey was made.

3. If, in answer to the direct interrogatories, you shall have stated that you went on board the French bark "Duc D'Aumale" in August or September, 1907, at the port of Rotterdam, for the purpose of surveying the hull of said vessel as to seaworthiness, please state whether such vessel at said time was in drydock.

4. Please state, if at this or any other time you

made a survey of the hull of the "Duc d'Aumale," precisely what was done by you personally to ascertain the condition of the rivets throughout the hull of said vessel.

5. Will you state under oath that you personally examined each rivet in the hull of the "Duc d'Aumale" and handled same?

6. State precisely what personal act or acts you performed as to each rivet examined by you and which constituted your examination [105] of such rivet.

7. Please state whether or not you have had any experience in surveying the hulls of vessels other than such as is incidental to your occupation as a master or officer of ships, and, if so, the details of that experience.

[Endorsed]: "Duc D'Aumale." French Interrogatories and Cross-interrogatories. William A. Crump & Son, 17 Leadenhall Street, London, E. C.

(Original stowage plan is transmitted herewith, in its original form, pursuant to stipulation and order of Court.) [106]

Translation of Certificate of Seaworthiness of "Duc d'Aumale."

REQUEST.

I beg to request the Consul of France at Rotterdam to kindly designate two experts to proceed to a survey of seaworthiness of the "Duc d'Aumale."

Rotterdam, Aug. 27/07.

Signed.

CONSULAR ORDINANCE.

We, Consul of France, at Rotterdam, have seen

the above request addressed to us for the purpose of designating two experts for the survey of the 3/m "Duc d'Aumale," and order as follows: Messrs. E. Le Roy and D. Beaudry, master mariners will proceed on board the said vessel for the purpose of holding above survey.

Rotterdam, Aug. 27/07.

Signed.

TAKING OATH.

Appeared before us Consul of France at Rotterdam the 27th day of August, 1907, Messrs. E. Leroy & D. Beaudry, Master mariners at Rotterdam, who have declared the acceptance of the appointment of surveyors for the seaworthiness of the 3/m "Duc d'Aumale" and to draw up a report of the result of their survey, and have promised under oath to proceed conscientiously with this survey.

In testimony whereof they have, after reading, signed with us, Consul above qualified, the day, month and year as above.

Signed. [107]

REPORT OF SURVEY.

We, undersigned, D. Beaudry, Master mariner, commanding the French ship "Jules Gomme" and Emile Le Roy, master mariner, commanding the French steamer "Niobe" certify having this day proceeded on board of the 3/m bark "Duc d'Aumale," filled out at Cardiff, Oct. 15/06, registering 1944-36/100 tons commanded by Benolt, master mariner.

In the presence of the said Captain and at his request, we proceeded with the survey of the interior and exterior of the vessel, and have found her to be

staunch, well rigged, provided with all her sails, ropes, anchors, chains, pumps and boats, provided with all articles and spare stores required by the rules, and in a perfectly seaworthy condition.

In consequence whereof we declare that the "Duc d'Aumale" can proceed to deep sea navigation in perfect security.

In testimony whereof we have signed the present report to be deposited at the Consulate of France, for whom it may concern.

Drawn up at Rotterdam Aug 27/07.

Signed.

(Rubber Stamp.) [108]

(Title of Court and Cause, and Number.)

**Commissioner's Certificate to Depositions of E.
Plisson et al.**

To All to Whom These Presents Shall or May Come :

I, Charles Ed. Simon, named in the attached stipulation as commissioner to take the depositions of the within named E. Plisson, C. Girard, D. Beaudry and E. Le Roy, upon interrogatories, direct and cross, attached to said stipulation, do hereby certify that, pursuant to said stipulation, the said witness E. Plisson, named therein, appeared before me on the seventh day of October, 1910; that said witness C. Girard, named therein, appeared before me on the seventh day of October, 1910; that said witness D. Beaudry, named therein, appeared before me on the first day of October, 1910, and that said witness, E. Le Roy, named therein appeared before me on the ninth day of February, 1910; that upon the days

mentioned, after administering oath, I took and completed the answers or deposition to said interrogatories and cross-interrogatories of each one of the said witnesses, said answers or deposition being hereunto annexed. Which said answers or deposition were taken down by a competent stenographic reporter designated by me therefor, and previously sworn to correctly take and transcribe such answers or deposition.

And I further certify that, previous to taking the said answer or deposition, I duly administered to each of said witnesses the following oath:

“You swear true answers to make to all such questions as shall be asked you upon these interrogatories and cross-interrogatories, without fear of, or favor to, either party hereto, and therein you swear to speak the truth, the whole truth, and nothing but the truth, so help you God.” [109]

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my seal at Nantes, France, this seventeenth day of December, 1910.

CHARLES ED. SIMON.

(Commissioner's Stamp.) [110]

(Title of Court and Cause, and Number.)

(13,959.)

**Answers to the Interrogatories by Captain Plisson,
of Trentemoult, on Behalf of the Compagnie
Maritime Francaise, for the French Three-masts
“Duc d'Aumale.”**

Answers to interrogatories propounded to Captain

PLISSON, a witness in the above-entitled action, residing at Trentemoult, near Nantes, taken by the Commissioner.

Said Captain Plisson, being first duly sworn, on oath deposes and says:

In answer to the first interrogatory:

1. Ernest Plisson; fifty-nine years old; captain for the world trade, former surveyor of the Nantes Tribunal of Commerce, acting actually as out-fitting captain.

In answer to the second interrogatory:

2. I am overlooker since 1899.

In answer to the third interrogatory:

3. I am a commissioned captain for the world trade since 1875.

I have commanded the wood sailing vessels since that time without cessation until 1881 when I took the command of the steel steamer until 1895.

Since 1895 until 1899, I have often been appointed as a surveyor by the Sea Underwriters and the Tribunal of Commerce, for the purpose of examining hulls, masts and cargoes of various sailing ships as well wood as iron or steel built. Since 1899, I am the overlooker of the *Compagnie Maritime Francaise* owning actually thirteen steel vessels. I have always inspected her ships on their returning to Europe where they came to deliver their cargoes and load again; this examination bore particularly on the surveys in drydock and stowage of the cargoes; very often, those cargoes were made of coke, pig iron or similar cargoes, what has given me a great experience with that kind of cargo. [111]

In answer to the fourth interrogatory:

4. I have surveyed the building of the "Duc d'Aumale" so as of all the other vessels belonging the Compagnie Maritime Francaise and I have followed her returns to Europe; every time I examined her in drydock and inspected the stowage of her cargoes.

In answer to the fifth interrogatory:

5. Length between perpendicular lines about seventy-nine meters sixty centimeters.

Main-beam breadth, twelve meters forty centimeters.

Moulded depth at the superior bottom, seven meters twenty-nine centimeters.

Between-decks height, two meters forty centimeters.

She carries about three thousand tons.

In answer to the sixth interrogatory:

6. During the stay of the "Duc d'Aumale" at Rotterdam, I have attentively examined all her parts during three days, from fourth to sixth September, as well afloat as in drydock, in company of Mr. Girard.

The internal survey of the hold did not let me discover anything wrong.

The frames, bracket plates, beams, floors plates, and cement at the bottom of the hold as well as the inside riveting were in a perfect state.

In drydock, where a special survey of the little bottom was passed by the Mr. Van Veen, Veritas Agent, Mr. Girard, a drydock foreman, and me, we found two defective rivets, which were at once renewed; some butts were joined with mastich; the re-

mainder of the hull, riveting, butts, was in a perfect state.

Besides, the rudder was inspected and lifted for the survey of the rudder braces and pintles. [112]

Several rudder rivets have been equally renewed.

I wrote the sixth and the seventh September, 1907, to the *Compagnie Maritime Francaise* for giving them all particulars of my survey. I show these two letters.

In answer to the seventh interrogatory:

7. I have just said under No. Six that two rivets were changed, a few butts joined with mastichs and the rudder repaired.

In answer to the eighth interrogatory:

8. In my opinion, having surveyed the building of the "Duc d'Aumale" and inspected her several times, I dare assert that said building was perfect and in a good keeping state on departure from Rotterdam in September, 1907.

In answer to the ninth interrogatory:

9. I have surveyed in agreement with the surveyor, the stowing of the cargo.

In answer to the tenth interrogatory:

10. The stowage plan was correct, prepared by the stevedore, but he made a mistake in writing two hundred and seventy tons in the little pig iron parcel astern; in fact, this made only seventy tons. I shall add that the height of the pile stowed in the hold is not in accordance with the scale.

The "Duc d'Aumale" had in the hold six hundred tons pig iron, whereof first tier were stowed in the greatest strength of the vessel and the greatest

breadth, that is to say, by midship beam, which is situated just under the back coaming of the main hatch.

The six hundred tons thus shipped were stowed in piles and without interruption on a length of sixty English feet, included between the main and astern hatches every piles had a mean height of about one meter ten centimeters. Sixty tons pig iron were also put in the 'tween-deck, then the remainder of hold and 'tween-deck entirely filled up with coke. [113]

In answer to the eleventh interrogatory:

11. I was on board the "Duc d'Aumale" when the pig iron was shipped and there remained only to *put* up the hold with coke; besides, I affirm that Captain Girard had all my instructions to survey the stowage when I was away from board.

In answer to the twelfth interrogatory:

12. The stowage, as it was actually made, has allowed the vessel, after and of her loading, to be in sheer, an indispensable condition to assure her good seaworthiness.

Besides, the six hundred tons pig iron placed where they have *put, were* in the most resisting part of the ship.

What concerns the stowage of a sailing ship, the order of the goods in the hold varies according to her building, her shapes and the voyage which has to be undertaken.

However as a rule, a sailing vessel loading a full general cargo must stow in the hold a little over the two-thirds of her cargo and the remainder in the 'tween-deck.

For instance, a vessel of three thousand tons; d. w. will load in the hold from two thousand one hundred to two thousand two hundred and fifty tons or thereabouts and in the 'tween-deck about seven hundred fifty to nine hundred tons.

But this rule is not an absolute one, as all depends upon the more or less sharp shapes of the ship to be loaded.

As for the coke cargo, it's impossible for whatever ship to take her complete cargo without having beforehand shipped and stowed in the bottom of the hold a certain quantity of ballast, sand, iron, pig iron or any other heavy goods to lower sufficiently the gravity center; without this cautious measure a ship would be innavigable. The number of tons in weight to be shipped varies according to the ship's shapes.
[114]

In answer to the thirteenth interrogatory:

13. Had the stowage of the 600 tons pig iron been effected as indicated by this interrogatory, it would have been defective.

In answer to the fourteenth interrogatory:

14. Because the shifting of part of the pig iron near the foremast would contrive in order to keep the sheer, to carry back a more important parcel pig iron quite astern, in the breech-moulding, which is the weakest part of the vessel. The straining would then be irregular and with bad weathers, the risks of damages to the hull would be much more to be feared.

In answer to the fifteenth interrogatory:

15. No.

In answer to the sixteenth interrogatory:

16. By distributing the 600 tons on a larger ground space, the height of the pig iron would have been less and consequently the gravity center too much lowered.

So by dividing this pig iron on a larger ground space, it would have been necessary, to keep the regular sheer, to shift a certain quantity of pig iron for stowing ahead of the first piles and also astern of the last ones.

In this last case and as I already said before the stern would have **sustained an extraordinary** straining and the rolling shocks, owing to the fall of the gravity center, would have been too violent, a partial or total dismasting being the possible consequence.

In answer to the seventeenth interrogatory:

17. The weight of the cargo in the lower hold and the between-deck was distributed thus for avoiding first a too heavy straining, weakening the blunt rolling strokes and at the same time, to give the ship a good stability and, in this way, to secure a perfect seaworthiness. [115]

In answer to the eighteenth interrogatory:

18. Yes.

In answer to the nineteenth interrogatory:

19. The division was made in accordance with the good stowing and right sense rules concerning our ships which are all built on the same shapes. *Owing their* fine lines, they can't, being empty, stand up without having in the hold a minimum dead weight of three hundred tons.

In these conditions, when the vessels are loaded

with a similar cargo to the "Duc d'Aumale" one, you can't leave in the hold less than 600 tons pig iron to give them good stability with a full cargo of coke or other like goods.

There is indeed no rule concerning the stowage, and the good sense and judgment of the captain acquainted with his ship have to provided by the division of the goods in the holds, for good seaworthy conditions.

For instance, two ships of same d. w. taking a similar cargo, may have a very important difference in their weight division.

A very broad vessel having by shapes and consequently able to stand up without ballast will have to put more weight in the 'tween-deck than another ship which would be less broad and whose shapes would be finer.

In answer to the twentieth interrogatory:

20. The comparison to establish between these two different stowing plans with regard to the qualities of a ship is quite simple.

First, with the stowage made at Rotterdam on board the "Duc d'Aumale," you may easily see that all cautions have been taken to give her a good seaworthy condition.

As I already said in the twelfth interrogatory, the six hundred tons have been put in the strongest part of the hold and the [116] stowage has been made by piles touching each other, with a mean height of about one meter ten centimeters per pile.

By so acting and after having completed the cargo with coke, you arrive to a regular sheer, the pitching,

owing to the light cargo stowed ahead was softened, and as I said before owing to the normal height of the gravity center, the rolling shocks, instead of being too rough, ought to be relatively slow.

On the contrary, by distributing the six hundred tons on a larger area in the hold, you lower the gravity center; on the other side, to keep the sheer after end loading, and to compensate the quantity pig iron which would have been put towards the fore part, it would have been necessary to stow about the after-part a quantity in the weakest part of the hold.

With such an arrangement it might have happened that the pig iron stowed ahead would have caused said vessel strong pitching and possibly a dismasting; for the same reason, the pig iron being stowed astern which is, as already said, the weakest part of the ship, could have occasioned an extraordinary straining.

In every manner, it was not possible to modify the distribution of the weights between hold and 'tween-deck.

In answer to the twenty-first interrogatory:

21. Yes.

In answer to the twenty-second interrogatory:

22. The "Duc d'Aumale" was provided with two double acting pumps, placed on deck, astern of the main mast and moved either by strength of arms or by help of the steam winch; they were supplied by the firm Babin-Chevaye Freres, of Nantes.

The adduction pipes measure one hundred eighty millimeters, so that the pumps of the "Duc d'Aumale" were about one third superior to the

Veritas Register's reglementar one. [117]

The regulations of the various classification registers stipulate:

Bureau Veritas, two pumps of 125 millimeters.

Lloyd's Register, two pumps of 125 millimeters.

Germanischer Lloyd, two pumps of 102 millimeters.

American Record, two pumps of 125 millimeters.

Consequently the "Duc d'Aumale" was supplied with pumps of an exceptional power.

During my stay at Rotterdam and besides the inspection and trials undertaken by the experts appointed by the French Consul, I have examined, after taking to pieces, all pieces which I acknowledged to be in perfect state; I shall add that, in our company, we had at the beginning sixteen vessels provided with similar pumps and never have we had the least trouble concerning said pumps.

(Commissioner's Stamp.) [118]

(Title of Court and Cause, and Number.)

Answers to Cross-interrogatories by Captain Plisson.

Answers to cross-interrogatories propounded to Mr. Plisson, a witness in the above-entitled action, residing at Trentemoult near Nantes, taken by me, Commissioner.

Said Captain Plisson, in answer to the first cross-interrogatory, says:

1. Yes, I am the inspector of the *Compagnie Maritime Francaise* since 1899.

Second cross-interrogatory:

2. My duties are:

1. To survey the building and out-fitting of our ships.
2. By every return to Europe, to survey them minutely afloat and in drydock, to undertake the repairs if any wanted, and to follow the stowage of all goods shipped on our vessels.

Third cross-interrogatory:

3. Lower hold, about 3,360 cubic meters.

Between-decks about 1,640 cubic meters.

Fourth cross-interrogatory:

4. A first examination was made by me on the dates of 4th and 5th September when the vessel was afloat.

I made the second inspection on drydock, the 5th and 6th September, at Rotterdamsche Droogdock Maatschappij Ltd.'s shipyard, which undertook the repairs; the ship entered in drydock the 5th September, at 3 P. M.

I was accompanied in my second visit by the following named persons: Mr. A. Van Veen, Bureau Veritas Rotterdam Agent, Mr. Girard, licensed captain for the world trade of Nantes, the foreman of aforesaid shipyard, whose name I don't know.
[119]

Fifth cross-interrogatory:

5. As I previously said, I have personally and thoroughly examined all small bottom, keel, plates and butts rivets.

Two rivets which we ascertained to be defective have been renewed and several butts puttied; the remainder of the hull was in perfect state.

Sixth cross-interrogatory:

6. The hold was completely filled with 2,675 tons pig iron and coke, whilst the cargo carrying capacity of the vessel is about three thousand tons.

Seventh cross-interrogatory:

7. No.

Eighth cross-interrogatory:

8. I have nothing to answer as I negatively replied to the previous question.

Ninth cross-interrogatory:

9. No, if the six hundred tons pig iron had been stowed more forward, the sixty tons pig iron in the between-decks, even put quite astern, would have been insufficient to poise the vessel which would have fallen *an* the head and not been seaworthy.

Tenth cross-interrogatory:

10. I have nothing to answer.

Eleventh cross-interrogatory:

11. Since 1881 when I have been the master of iron ships, I have continually examined, as a surveyor, the hulls of iron and steel vessels. I dare therefore certify that my experiment is absolutely completed concerning those ships.

Twelfth cross-interrogatory:

12. I don't understand quite well this question and it's difficult for me to answer to same. [120]

Thirteenth cross-interrogatory:

13. The "Duc d'Aumale" could have taken three hundred tons pig iron more to reach about her d. w., but on the other side the quantity of coke would have been diminished by about forty tons.

For three hundred tons pig iron besides the six

hundred and sixty shipped tons and considering the density of that stuff two hundred to two hundred and ten tons would have been stowed in the hold and ninety to one hundred tons in the 'tween-deck.

Fourteenth cross-interrogatory:

14. What concerns the "Duc d'Aumale" and as already said, six hundred tons pig iron are necessary for her stability and good seaworthy conditions, considering the vessel to complete her cargo with coke.

By suppressing the sixty tons pig iron stowed in the between-decks, this would simply have allowed to ship seven to eight tons coke more.

Fifteenth cross-interrogatory:

15. Approximately, yes, exactly, no.

This is the reason why you always reserve for the end of the loading a small parcel goods to trim the vessel at the last moment.

Sixteenth cross-interrogatory:

16. I already answered this question in my previous reply.

Seventeenth cross-interrogatory:

17. I personally unshipped both pumps and tested after so doing all pieces which I found in perfect state.

QUESTION.—Have you anything to add concerning the case which is the motive of these interrogatories and cross-interrogatories?

ANSWER.—I have nothing more to declare.

Sworn to at Nantes, France, the seventh day of October, 1910, before me.

(Commissioner's Stamp)

Signed: E. PLISSON.

CHARLES ED SIMON. [121]

(Title of Court and Cause, and Number.)

**Answers to Interrogatories by Captain Girard, of
Trentemoult near Nantes, on Behalf of the
Compagnie Maritime Francaise, for the French
Three-masts "Duc d'Aumale."**

Answers to interrogatories propounded to Captain GIRARD, a witness in the above-entitled action, residing at Trentemoult, near Nantes, taken by the Commissioner.

Said Captain Girard, being first duly sworn, on oath deposes and says:

In answer to the first interrogatory:

1. Girard, Constant Denis, captain for the world trade; former outfitting captain in the Compagnie des Voiliers Havrais. I am sixty-two years of age.

In answer to the second interrogatory:

2. During seven years and a half, until July, 1909.

In answer to the third interrogatory:

3. I have commanded numerous sailing vessels, so well wood as steel built, in my quality of over-looker. I have often examined hulls of sailing vessels and surveyed the stowage of their cargoes, but, except the "Duc D'Aumale," I have not had opportunity survey cargoes consisting in pig iron and coke.

In answer to the fourth interrogatory:

4. I don't know specially the "Duc D'Aumale"; I have been sent to Rotterdam in order to assist Mr. Plisson.

In answer to the fifth interrogatory:

5. I have examined the "Duc D'Aumale" with

the greatest attention in all her parts; I found her in perfect state except some defects in the hull and rudder which have been repaired in drydock.
[122]

In answer to the sixth interrogatory:

6. The hull has been inspected in drydock with the greatest care; two defective rivets have been renewed and butts were filled with putty. The rudder has been inspected; some rivets were replaced and pintles and braces were readjusted. The seventh September, 1907, I wrote Mr. Polo, manager the Compagnie Maritime Francaise, giving him all particulars and I join said letter to the file.

In answer to the seventh interrogatory:

7. I have but followed and executed the instructions of the surveyor who has followed the loading, and of Mr. Plisson, the company's overlooker. My opinion was besides in accordance with their own one.

In answer to the eighth interrogatory:

8. According to my opinion, the stowage has been made as it might to be.

In answer to the ninth interrogatory:

9. Because stowed as she was, the vessel was thus in perfect seaworthiness.

In answer to the tenth interrogatory:

10. My opinion is that this way of doing might to have given less security than the method which has been used.

In answer to the eleventh interrogatory:

11. Because the vessel would thus have strained

to the excess in various parts and specially at the extreme stern.

In answer to the twelfth interrogatory:

12. I believe that the rolling would have been sensibly the same in both cases but the pitching would have been infinitely harder if the pig iron had been stowed in three parcels and the ship would have strained much more.

In answer to the thirteenth interrogatory:

13. Yes. [123]

In answer to the fourteenth interrogatory:

14. They are alike the ones of the most part of vessels having same tonnage, and, in my opinion, are very sufficient.

In answer to the fifteenth interrogatory:

15. Yes, in answer to both questions.

In answer to the sixteenth interrogatory:

16. Two experts, Messrs. Beaudry and Le Roy, have been appointed, at my request by the French Consul at Rotterdam; they have afterwards fulfilled their duty.

In answer to the seventeenth interrogatory:

17. I accompanied the experts in their survey and gave them all assistance they were in want of.

(Commissioner's Stamp.) [124]

(Title of Court and Cause, and Number.)

Answers to Cross-interrogatories by Captain Girard.

Answers to cross-interrogatories propounded to Mr. GIRARD, a witness in the above-entitled action, residing at Trentemount near Nantes, taken by me, Commissioner.

Said Captain GIRARD, in answer to the first cross-interrogatory, says:

1. I am not a employee of the Compagnie Maritime Francaise; I had simply a temporary mandamus to inspect at Rotterdam the "Duc d'Aumale."

Second cross-interrogatory:

2. My duties were to watch the discharging, loading and out-fitting of the vessel.

Third cross-interrogatory:

3. I don't know it.

Fourth cross-interrogatory:

4. I have accompanied in the examination of the ship in drydock Messrs. Plisson, Van Veen, Bureau Veritas Rotterdam agent, and the foreman of the Rotterdamsche Droogdok Maatschappij Ltd. I have examined the "Duc d'Aumale" during my stay at Rotterdam and specially the 4th, 5th, and 6th, September, afloat and in drydock. The works have been made by the Rotterdamsche Droogdock Maatschappij, already mentioned.

Fifth cross-interrogatory:

5. After a very particular examination, specially of the rivets, I only saw to be made the repairs mentioned in the sixth interrogatory the remainder being in a perfect state.

Sixth cross-interrogatory:

6. Yes. [125]

Seventh cross-interrogatory:

7. There is no absolute rule; all depends upon the vessel's shapes.

Eighth cross-interrogatory:

8. I have not to answer because in my opinion,

there is no absolute rule.

Ninth cross-interrogatory:

9. I consider that the best place has been choosed to stow the pig iron.

Tenth cross-interrogatory:

10. I have nothing to answer owing to my precedent reply.

Eleventh cross-interrogatory:

11. I am a captain licensed for the world trade since thirty-eight years and have fulfilled the office of overlooker since seven and a half years in the service of the *Compagnie des Voiliers Havrais*, at Havre. I have had repeated occasions to examine the hulls of the iron and steel ships, as a surveyor.

Twelfth cross-interrogatory:

12. It's not possible for me to answer positively to this question; I should have to make complex and difficult calculations.

Thirteenth cross-interrogatory:

13. In my opinion, the vessel being equally filled in this case, could have taken about two or three hundred tons of pig iron more and a little less coke, remaining, however, in a seaworthy manner.

Fourteenth cross-interrogatory:

14. It was impossible for the "*Duc d'Aumale*" to sail in security without having at least six hundred tons pig iron in the hold.

Fifteenth cross-interrogatory:

15. It is difficult to do it surely; all depends upon the ship's shapes and her nautical capacities. [126]

Sixteenth cross-interrogatory:

16. I have nothing to answer, my previous reply not being peremptory.

Seventeenth cross-interrogatory:

17. The examination was thoroughly made in my presence by Messrs. Beaudry and Le Roy, surveyors.

Eighteenth cross-interrogatory:

18. Messrs. Beaudry and Le Roy, Captains, appointed as experts by the Consul, had certainly the requested qualifications to accomplish worthily their duty.

Nineteenth cross-interrogatory:

19. I have answered to this question under number eleven of the cross-interrogatory.

QUESTION.—Have you anything to add concerning the case which is the motive of these interrogatories and cross-interrogatories?

ANSWER. I have nothing more to declare.

Sworn to and at Nantes, France, the seventh day of October, 1910, before me.

Signed: C. GIRARD.

CHARLES ED SIMON.

(Commissioner's Stamp.) [127]

(Title of Court and Cause, and Number.)

Answers to Interrogatories Propounded to Captain Beaudry, a Witness in the Above-entitled Action, Residing at Granville, Taken by the Commissioner.

Said Captain BEAUDRY, being first duly sworn, on oath deposes and says:

In answer to the first interrogatory:

1. Beaudry, captain for the world trade; over-

looker of the Societe Bayonnaise de Navigation; thirty-nine years old.

In answer to the second interrogatory:

2. Since four years.

In answer to the third interrogatory:

3. I navigated during 24 years on board sailing vessels and am consequently well acquainted with deep sea vessels which I commanded in ten years.

In answer to the fourth interrogatory:

4. I made numerous surveys, especially the "Germaine" and the "Charles Gounod" at Hull in 1904, the "Valparaiso" at Cardiff in 1907, the "La Perouse" at Antwerp in 1909, all these ships being steel built, and a quantity of other ones.

In answer to the fifth interrogatory:

5. Yes, I was at Rotterdam in August and September, 1907, surveying the ship "Jules Gomme" belonging to the Societe Bayonnaise, and at the request of the French Consul, I was appointed as surveyor on board the "Duc d'Aumale" with Mr. Le Roy, captain for the world trade.

In answer to the sixth interrogatory:

6. I inspected the deck, masts, hold, ceiling cementing of the bottom and the accessory pumps, as well as re-exchange of the "Duc d'Aumale" and found everything in perfect order. [128]

In answer to the seventh interrogatory:

7. I went on board the "Duc d'Aumale" the 27th August, 1907; together with Mr. Le Roy, captain for the world trade, and Mr. Girard, overlooker.

In answer to the eighth interrogatory:

8. I already answered by number six.

In answer to the ninth interrogatory:

9. The result of my examination was that the vessel was in perfect seaworthiness.

In answer to the tenth interrogatory:

10. Yes.

In answer to the eleventh interrogatory:

11. After reading of the copy of the survey report, I state that said copy is a correct one of the original report, signed by me on the subject of the good seaworthiness of the "Duc d'Aumale."

(Commissioner's Stamp.) [129]

(Title of Court and Cause, and Number.)

Answers to Cross-interrogatories by Captain Beaudry.

Answers to cross-interrogatories propounded to Mr. BEAUDRY, a witness in the above-entitled action, residing at Granville, taken by me, Commissioner.

Said Captain BEAUDRY, in answer to the first interrogatory.

1. I answered to this question under number four of the direct interrogatory.

Second cross-interrogatory:

2. In the surveys I made previously to the "Duc d'Aumale's" one, I don't remember to have had the opportunity of requiring repairs besides these required by Lloyd's or Veritas, which repairs possibly included changes of rivets.

Third cross-interrogatory:

3. The "Duc d'Aumale" was afloat.

Fourth cross-interrogatory

4. I went down in the hold with Mr. Le Roy and together we passed the examination of the rivets, specially of the hull's ones.

Fifth cross-interrogatory:

5. I state under oath that I examined all visible rivets in the hull and that I found none of them bad.

Sixth cross-interrogatory:

6. I have just answered to this question under number five.

Seventh cross-interrogatory:

7. My overlooker's duties oblige me often to examine the hulls of the steel ships and I have got by so doing a strong experience.

QUESTION.—Have you anything to add concerning the case which is the motive of these interrogatories and cross-interrogatories?

ANSWER.—I have nothing more to declare.
[130]

Sworn to at Nantes, France, the first day of October, 1910, before me.

Signed: BEAUDRY,

CHARLES ED. SIMON.

(Commissioner's Stamp.) [131]

(Title of Court and Cause, and Number.)

**Answers to Interrogatories by Captain Le Roy, of
Ouireham, on Behalf of the Compagnie
Maritime Francaise, for the French Barque
"Duc d'Aumale."**

Answers to interrogatories propounded to Captain Emile Le Roy, a witness in the above-entitled action, residing at Ouireham, taken by the authorized Commissioner.

Said Captain LE ROY being first duly sworn, on oath deposes and says:

In answer to the first interrogatory:

1. Emile Le Roy; thirty-eight years old; captain for the world trade; master of S. S. "Niobe."

In answer to the second interrogatory:

2. I have been sailing during nineteen years and have seven years command; since four years, I command S. S. "Niobe," of eighteen hundred tons dead-weight.

In answer to the third interrogatory:

3. I sailed as sailor and mate in world-trading sail and steam ships, and my whole command was employed in the international trade.

In answer to the fourth interrogatory:

4. I undertook many navigability surveys of steamers and sailing vessels since I am a captain. I did not take notice of all of them but here are the ones which I noted and remember:

French steel S. S. "Carol I," Newcastle-on-Tyne, 1903.

Steel three-masts barque "Jean Bart," of Dunkirk, Cardiff, 1906.

French steel barque "Joinville" of Havre, 9th March 1907, at Rotterdam.

Surveys in drydock, after hull damage, of steel steamers [132] "Jarlot," of Morlaix and "Lutece," of Rouen, in the course of 1907.

I don't mention the surveys which I may have made since the "Duc d'Aumale's" one.

In answer to the fifth interrogatory:

5. Yes. I was in Rotterdam with S. S. "Niobe"

towards the 25th August, 1907, and went, at the request of the French Consul in Rotterdam, on board the sailing vessel "Duc d'Aumale" for the navigability visit of this ship.

In answer to the sixth interrogatory:

6. After having gone on board, at the request of the French Consul, and in the presence of Mr. Girard, overlooker, and Mr. Allemand, world-trading captain, acting by the time as ship's master, I went down the hold to look and sound attentively the ship's sides as well as the frames and stiffeners of all kinds binding the plates between each other; I let work the pumps, which were in good order and gave no water, I ascertained the good state of the masts' step, I inspected the sail-room, and ascertained all material and spare sails of the ship which was fully provided with same, having two complete suits of sails.

In answer to the seventh interrogatory:

7. I went on board the "Duc d'Aumale" the 27th August, 1907. I was assisted by Mr. Beaudry, world-trading captain and in the presence of aforesaid Mr. Girard and aforesaid Mr. Allemand.

In answer to the eight interrogatory:

8. I already answered the question by number six.

In answer to the ninth interrogatory:

9. The result of the examination was, from every point of view, in favour of the ship, giving me full satisfaction. The "Duc d'Aumale" was in a perfectly state of navigability. [133]

In answer to the tenth interrogatory:

10. Yes.

In answer to the eleventh interrogatory:

11. After reading of the copy of the survey report.

I state that it's a correct copy of the original report, signed by me on the subject of the seaworthiness of the "Duc d' Aumale."

(Commissioner's Stamp.) [134]

(Title of Court and Cause, and Number.)

Answers to Cross-interrogatories by Captain Emile Le Roy.

Answers to cross-interrogatories propounded to Mr. EMILE LE ROY, a witness in the above-entitled action, residing at Ouistreham, taken by me, Commissioner.

Said Captain EMILE LE ROY, in answer to the first cross-interrogatory, says:

1. I have already answered this question in the 4th question of the direct interrogatory. All these ships were steel built.

Second cross-interrogatory:

2. I have always found the ships which I have surveyed in good state, their rivets well tight.

The ships which I have surveyed after having sustained damages were repaired when I inspected them for their seaworthiness survey.

Third cross-interrogatory:

3. The "Duc d'Aumale" was afloat when I went on board for the survey.

Fourth cross-interrogatory:

4. With the help of a hammer, I have sounded

inside the vessel all accessible rivets including the hull's ones.

Fifth cross-interrogatory:

5. I could not examine all rivets of this vessel as she had some goods into the hold but I left shift, on various places, these goods and I verified that the plates were very dry and without any trace or rust caused by unstaunched rivets. I state under oath this is the express of the truth.

Sixth cross-interrogatory:

6. I have examined these rivets with a hammer and tried in vain to shake them with my hand. [135]

Seventh cross-interrogatory:

7. Independently to my surveys which I undertook during my command I believe I dare say that I have some experience in this matter, having been engineer on board steamers and being provided with a certificate as first-class engineer, in the mercantile marine.

QUESTION.—Have you anything to add concerning the case which is the motive of these interrogatories and cross-interrogatories?

ANSWER.—I have nothing more to declare.

Sworn to at Nantes, France, the ninth day of February, 1910, before me.

Signed: LE ROY.

CHARLES ED. SIMON.

(Commissioner's Stamp.)

[Endorsed]: Opened and filed Feby. 16th, 1911.
Jas. P. Brown, Clerk. By M. T. Scott, Deputy
Clerk. [136]

(Title of Court and Cause.)

**Depositions of Y. Perrot, Pierre Lalande and A. Rio,
Taken on Behalf of the Respondent Before
James P. Brown, Esq., U. S. Commissioner, etc.**

BE IT REMEMBERED, that on Tuesday, December 29th, and Wednesday, December 30th, 1908, pursuant to stipulation of counsel hereunto annexed, at the office of L. T. Hengstler, Esq., in the Kohl Building, in the City and County of San Francisco, State of California, personally appeared before me, James P. Brown, Esq., a United States Commissioner for the Northern District of California, to take acknowledgments of bail and affidavits, etc., Y. Perrot, Pierre Lalande and Alphonse Rio, witnesses produced on behalf of the respondent.

Charles Page, Esq., of the firm of Messrs. Page, McCutchen & Knight, appeared as proctor for the libelants, and L. T. Hengstler, Esq., appeared as proctor for the respondent, and the said witnesses, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the cause aforesaid, did thereupon depose and say as is hereinafter set forth.

(It is hereby stipulated and agreed by and between the proctors for the respective parties that the depositions of Y. Perrot, Pierre Lalande and Alphonse Rio may be taken *de bene esse* on behalf of the respondent, at the office of L. T. Hengstler, Esq., in the Kohl Building, in the City and County of San Francisco, State of California, on Tuesday, December 29th, and Wednesday, December 30th, 1908, com-

inside the vessel all accessible rivets including the hull's ones.

Fifth cross-interrogatory:

5. I could not examine all rivets of this vessel as she had some goods into the hold but I left shift, on various places, these goods and I verified that the plates were very dry and without any trace or rust caused by unstaunched rivets. I state under oath this is the express of the truth.

Sixth cross-interrogatory:

6. I have examined these rivets with a hammer and tried in vain to shake them with my hand. [135]

Seventh cross-interrogatory:

7. Independently to my surveys which I undertook during my command I believe I dare say that I have some experience in this matter, having been engineer on board steamers and being provided with a certificate as first-class engineer, in the mercantile marine.

QUESTION.—Have you anything to add concerning the case which is the motive of these interrogatories and cross-interrogatories?

ANSWER.—I have nothing more to declare.

Sworn to at Nantes, France, the ninth day of February, 1910, before me.

Signed: LE ROY.

CHARLES ED. SIMON.

(Commissioner's Stamp.)

[Endorsed]: Opened and filed Feby. 16th, 1911.
Jas. P. Brown, Clerk. By M. T. Scott, Deputy
Clerk. [136]

(Title of Court and Cause.)

**Depositions of Y. Perrot, Pierre Lalande and A. Rio,
Taken on Behalf of the Respondent Before
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mencing at the hour of 10 A. M. of each day, before James P. Brown, Esq., a United States Commissioner for the Northern District of California, and in shorthand by Clement Bennett. [137]

It is further stipulated that the depositions, when written out, may be read in evidence by either party on the trial of the cause, that all questions as to the notice of the time and place of taking the same are waived, and that all objections as to the form of the questions are waived unless objected to at the time of taking said depositions, and that all objections as to materiality and competency of the testimony are reserved.

It is further stipulated that the depositions may be used and read in evidence in the case of the *Compagnie Maritime Francaise*, a French Corporation, Libellant, vs. The Cargo of the French Bark "Duc d'Aumale."

It is further stipulated that the reading over of the testimony to the witnesses and the signing thereof is hereby expressly waived.

(F. Henry, by stipulation, acted as interpreter.)

Deposition of Y. Perrot, for Respondent.

Y. PERROT, called for the respondent, sworn.

Mr. HENGSTLER.—Q. How old are you, Captain? A. Twenty-six.

Q. How long have you been master of vessels?

A. Seven months.

Q. Of what vessel are you the master now?

A. The "Marshal de Tureune."

Q. What cargo did the "Marshal de Tureune" carry on her last voyage?

(Deposition of Y. Perrot.)

A. Pig iron, brick and coke.

Q. What kind of a ship is she?

A. A French bark.

Q. A four-master? A. Three-master. [138]

Q. A wooden ship or steel ship? A. Steel.

Q. In a general way, how was the cargo stowed in the "Marshal de Tureune"?

A. There was brick in the after part of the after-hatch, 20,000 brick there. In the fore part of the after-hatch, there was again 20,000 bricks, and 700 ton of pig iron from there to the main hatch.

Q. Where was the coke stowed?

A. The coke was all over the cargo.

Q. Over all the rest of the cargo? A. Yes, sir.

Q. Where was your vessel stowed?

A. Newcastle-on-Tyne.

Q. Have you seen the stowage plan of the "Duc d'Aumale"? A. No, sir.

Q. Will you look at this plan, Captain, and will you state in what respect, if any, the stowage of the "Duc d'Aumale" differs from the stowage of your vessel? (Handing.)

A. There is no difference. Our iron is exactly in the same place.

Q. And how about the coke?

A. And the coke also.

Q. Captain, how long have you had experience in the stowage of vessels?

A. This is the first time that I have seen a general cargo loaded.

Q. Have you been on board the "Duc d'Aumale"?

(Deposition of Y. Perrot.)

A. Yes, sir.

Q. You were on board, were you not, when the agent of the Bureau Veritas examined the "Duc d'Aumale"?

A. Yes, sir; I saw a gentleman there, but I don't know if it was the surveyor of the Bureau Veritas.

Q. What did the gentleman do when you were on board? A. He was examining the pumps.

Q. Were you present during the examination?

A. Yes, sir.

Q. Did you see the pumps? A. Yes, sir.

Q. How do they compare with the pumps on your vessel, the "Marshal [139] de Tureune"?

A. They are exactly the same.

Q. Do you know how those pumps compare with the pumps used in other French vessels?

A. It is the only model of pump that I saw on board of French ships.

Q. Now, Captain, I want to ask you another question with reference to stowage, if you know. Do you know the reason why pig iron is stowed in the after part of a vessel?

A. Because without that, we could not take enough coke to load the vessel.

Q. Is that the only reason that you know of?

A. That is the only reason.

Q. Do you know any reason, Captain, why a cargo like pig iron could not be stowed in the fore part of a vessel?

A. You must have the weight aft in order to take in a full cargo.

(Deposition of Y. Perrot.)

Q. Do you mean by that that the heavy cargo should be in the after part of a vessel? If you do not mean it, say so. A. Yes, sir.

Cross-examination.

Mr. PAGE.—Q. Why must the heavy part of the cargo be in the after part of the lower hold of the vessel only?

A. For the good stability of the ship.

Q. Do you know whether there is any recognized rule as to the amount of cargo in weight to be carried in the lower hold as compared with the amount carried in the between-decks?

A. I do not know the regulation.

Q. I do not ask whether there is any law, but whether there is any rule among those who understand the stowage of ships, giving some proportion between the two, the lower deck and the upper deck.

A. About one-third in between-decks.

Q. And that is necessary, is it not, for the stability of the ship?

A. The rolling of the ship is not so heavy with a good weight in the between-decks. [140]

Q. And if the ship does not roll, then she does not labor so much in a heavy sea?

A. It depends a good deal on the ship.

Q. Is it not the ordinary result of rolling that a ship must strain in a heavy sea?

A. Yes, sir; all the ship works a good deal during rolling.

Q. Is your ship owned by the same company that owns the "Duc d'Aumale"? A. No, sir.

(Deposition of Y. Perrot.)

Q. Do you know whether she was built by the same builder? A. I do not know.

Q. Do you know whether she is exactly the same class in her lines and method of building?

A. Exactly.

Q. Is she exactly the same tonnage?

A. My ship is 1,938 register. I do not know the "Duc d'Aumale's."

Q. In the voyage on your ship altogether, what was the quantity of bricks that you had on board?

A. 43,000 bricks.

Q. Can you tell what the weight of those bricks was? A. 116 tons.

Q. And were all of those bricks in the after part of the lower hold?

A. There were 15,000 bricks stored forward the main hatch.

Q. Was that all in the lower hold, or in the between-decks? A. In the lower hold.

Q. What weight did you have of iron on that voyage? A. 875 tons.

Q. Where was the iron stowed?

A. In the lower hold, and part in the between-decks.

Q. How much in the between-decks?

A. 200 ton in the between-decks.

Q. And how much coke did you have on board of your ship? A. 1800.

Q. How many tons of that coke were in the between-decks? A. I don't know exactly.

Q. Do you know how much of the coke was in the

(Deposition of Y. Perrot.)

lower hold? A. I don't now either. [141]

Q. So that you cannot tell as to whether your own ship was stowed with one-third of the weight of the cargo in the between-decks, and about two-thirds in the lower hold? A. I don't know exactly.

Q. Have you any judgment as to what really was the weight in the between-decks, and what was really the weight in the lower hold—have you any judgment that you can speak of?

A. I estimate 600 ton of coke in the between-decks, and 200 tons of pig iron.

Q. That would be 800 tons in the between-decks?

A. Yes, sir.

Q. And about how much altogether in the lower hold? A. 2,000 tons.

Q. If your ship was carrying 600 tons of pig iron, and the rest coke, would you consider that it was a proper division of the iron to place 600 tons in the after part of the lower hold, and only 60 tons of cargo between-decks? A. Yes, sir.

Q. In your ship, according to the rule that you have mentioned that there should be about one-third in the between-decks and two-thirds in the lower hold, do you consider that placing 660 tons of cargo in your between-decks, and 2,000 tons in the lower hold would be good stowage? A. Yes, sir.

Q. If you placed more of the heavy cargo in the between-decks than 60 tons, would not the ship be less liable to strain and labor in a heavy sea than if you leave 600 tons in the lower hold as well as the coke?

A. I do not believe it.

(Deposition of Y. Perrot.)

Q. Why did you put 800 tons of cargo in the between-decks in your own ship if you thought that 660 tons would be enough in the between-decks?

A. I did not know at the time exactly the weight I could take.

Q. Was your ship stowed under your personal direction on this last voyage?

A. No, sir, the overlooker of the company was there.

Q. So that you had nothing to do with it?

A. No, sir.

Q. I understand that you never have superintended the stowing of a ship yourself?

A. No, sir; not yet. [142]

Q. In what kind of ships have you been engaged before this voyage, Captain?

A. On ships which were in the Chili trade.

Q. Carrying nitre? A. Yes, sir.

Q. No general cargo at all; all single cargo?

A. No general cargo.

Redirect Examination.

Mr. HENGSTLER.—Q. Did the coke in your ship fill out the entire hold and between-decks, except that part of it which was filled by pig iron and brick?

A. Yes, sir.

Deposition of Pierre Lalande, for Respondent.

PIERRE LALANDE, called for the respondent, sworn.

Mr. HENGSTLER.—Q. How old are you, Captain? A. Twenty-six.

Q. How long have you been going to sea?

(Deposition of Pierre Lalande.)

A. About eight years.

Q. You are the master of the "Duc d'Aumale," are you not? A. Yes, sir.

Q. How long have you been her master?

A. Sixteen months.

Q. That is during this last voyage? A. Yes, sir.

Q. Was this the first voyage that you have made in the "Duc d'Aumale"? A. Yes, sir.

Q. The last one? A. Yes, sir.

Q. Had you been master of any ship before you became master of the "Duc d'Aumale"?

A. No, sir.

Q. About what time, Captain, did you join the "Duc d'Aumale," and where?

A. At Rotterdam, September, 1907.

Q. Did you superintend her stowage?

A. No sir.

Q. Who superintended her stowage?

A. The overlooker, the port captain.

Q. He is in the employ of the company, is he not?

A. Yes, sir. [143]

Q. The superintendent of the vessel while she is in port, is he not? A. Yes, sir.

Q. What is the name of this superintendent?

A. Plisson.

Q. When you joined the vessel, had her loading been completed? A. Not quite.

Q. You saw the last part of it? A. Yes, sir.

Q. Do you know whether or not any survey of the hull of the vessel *yourselves*, had been made before you joined her, and how long before?

(Deposition of Pierre Lalande.)

A. I don't know exactly how long it was before they took cargo, but I know for a fact that the survey had been passed in drydock by the agent of the Bureau Veritas, and two captains.

Mr. PAGE.—Q. Do you know that of your own knowledge, or whether someone told you about it?

A. I have the certificate.

Q. That is all you know about it?

A. Yes, sir; that is all I know about it.

Mr. HENGSTLER.—Q. Where is the certificate of the report of survey?

A. It has been on board up to now.

Q. You have that certificate?

A. Yes, sir (producing.)

Q. Is this the certificate that has been on board of your ship? A. Yes, sir.

Q. And you brought it with you on board of the ship to this port, did you? A. Yes, sir.

Mr. HENGSTLER.—I offer this in evidence.

Mr. PAGE.—I object to it as hearsay.

Mr. HENGSTLER.—I will offer in evidence the original and translation thereof, as “Respondent's Exhibit 1.”

(The original and translation are marked “Respondent's Exhibit 1.”)

Q. I will show you this document, and I will ask you whether that is one of the ship's papers, and if so, what it is (handing). [144]

A. That is one of the papers of the ship. It was given at Rotterdam.

Q. To whom? A. To me.

(Deposition of Pierre Lalande.)

Q. At Rotterdam?

A. By the consignee of the ship, Mr. Vandersie.

Mr. HENGSTLER.—I offer this in evidence, and ask to have it marked Respondent's Exhibit 2.

Mr. PAGE.—Objected to as hearsay.

(The document is marked Respondent's Exhibit 2.)

Mr. HENGSTLER.—Q. On what date did the vessel leave Rotterdam?

A. 17th of September, 1907. She was cleared on the 17th, and left Rotterdam on the 19th.

Q. What was the first port at which she stopped?

A. Brest.

Q. Where is Brest? A. In France.

Q. And how long did she remain there, and on what days?

A. She arrived on the 22d at 3 P. M., and left on the 24th at 9 A. M. in the morning.

Q. Now, Captain, will you describe the first parts of the voyage, referring to your log, day after day, with reference to the weather which you encountered?

A. We left Brest on the 21st at 9 o'clock in the morning. There was a small breeze from the north, shifting from the north to west, and we sailed until the 26th of September, and had fine weather and calm sea. We encountered westerly winds with a choppy sea.

Q. On what day?

A. The 26th of September. There was a swell until the 28th.

(Deposition of Pierre Lalande.)

Q. What occurred on the 28th?

A. The wind hauled to the southwest, freshening and increased, the sea coming heavy rapidly. The wind shifted to the northwest on the 28th at 2 o'clock in the morning. The weather cleared up, but the sea became very heavy. [145] We had very violent squalls, especially during the watch from 8 o'clock in the morning until noon. The weather became cloudy again in the afternoon with squalls, the sea being very heavy, direction west, northwest. From 8 P. M. to midnight, the sea was still heavier, and the squalls more and more violent.

Q. Are you still on the 28th?

A. Yes, sir; on the 29th the weather became fine, and the squalls less and less violent, the wind decreasing rapidly, there being still a squall. There were times when the ship was rolling heavily, the sea coming from abeam. At 4 o'clock in the afternoon, we found the increase of water in the ship's hold. We found 23 centimeters at four o'clock. We pumped at once, and cleared the water from the hold in a quarter of an hour.

Q. What latitude and longitude was the vessel in on that day, the 29th?

A. 38 degrees, 28 minutes north latitude at noon; 17 degrees, 43 minutes west. The vessel was steering south 35 degrees west.

Q. Now, go ahead and tell what happened next.

A. We saw every day that water was increasing in the hold regularly, about one centimeter every hour.

(Deposition of Pierre Lalande.)

Q. What did you do with the pumps during that time?

A. We pumped regularly, morning and evening. At 7:20 in the morning and 4:20 at night.

Q. For how long a time each time?

A. About twenty minutes each time.

Q. Did you succeed in controlling the inflow of the water by this pumping?

A. By pumping forty minutes, we cleared the water from the hold. [146]

Q. How long did that go on?

A. Nothing happened particularly until the 22d of November.

Q. Where was the vessel on that day?

A. The vessel was about forty-nine degrees, thirty-seven minutes south latitude, and 66 degrees, 21 minutes west longitude. On that date the weather was fine until 9 o'clock at night. The wind increased in force rapidly, and we had to take in all sails but the foresail, two lower topsails, and the lower stay-sails. At 11 o'clock, the wind blew a storm, and the sea became heavier very rapidly. At twelve o'clock, in a gust, we lost the topmast stay-sail and the mizzen stay-sail. In a while the sea became tremendous, and we lost the fore stay-sail. The ship not being stayed by the sails we had lost, she rolled terribly. The decks were full of water. The decks being full of water, and the ship rolling heavily, we could not get the exact soundings.

Q. Could you pump?

A. No, sir; we could not pump. I went myself in

(Deposition of Pierre Lalande.)

the pump well, and I saw there was an increase of water, but we could not pump because the bottom of the pipe at each rolling was dry, the vessel being on her side. Another survey was made at four o'clock in the afternoon, and we saw the same thing, the sea being still very heavy, and the wind shifting to the southwest, the ship in a cross sea. We wore the ship around at 8 o'clock. The sea was very high until the 25th of November at 8 o'clock A. M. On the 24th of November, coming around westerly at 2 o'clock P. M., we wore the ship around to take a starboard tack. I ordered the pumps to be sounded by the carpenter when the ship was upright, and the carpenter reported that he found one meter and 25 centimeters in the hold, so that the water had increased rapidly since the morning. After the wearing of the ship, I set one watch to the pumps, and ordered an examination of the life-boats [147] made to see that they were in order. At six o'clock, the wind freshened again, big seas coming from every part; the decks being always covered with water it was very difficult to work the pumps. At six o'clock, we found one meter, and fifty-five centimeters in the hold. At six o'clock I called the crew aft and explained to them the situation, and we resolved to take refuge in the Falkland Islands for the saving both the cargo and the ship. At the same hour we kept her off, and made for the Islands.

Q. We do not need the further details until you get to the place where you beached the ship.

(Deposition of Pierre Lalande.)

A. That is a few hours later. Both watches were relieving each other at the pumps every half hour, so they were working continually, and I saw that the water did not increase so much while the ship was running before the wind. The ship was steering very badly when we were close to Roy Cove. We entered the cove at 4:30 and at 4:35 the ship was beached at 500 meters from the entrance to the cove. At that time the sounding of the pump was two meters and 27 centimeters, the ship having a list of 6 degrees to starboard.

Q. Now, how long were you at Roy Cove with the ship? A. Until the 17th of December.

Q. How long did the vessel lie on the beach at Roy Cove? A. Until the 15th of February.

Q. What steps did you take during that time after the vessel was beached to communicate with the outside world, and communicate with your owners, or the owners of the cargo, if any?

A. As soon as we arrived at Roy Cove, a postman passed on horseback, on his way to Fox Bay, and I gave him a letter, and told him to try to send my letter to Port Stanley. I gave him a cable in which I could say only very little, because I knew not much about [148] the ship's situation or damage. A few days afterwards, on the 3d of December, one schooner named the "Lafonia" passed, and I gave him my mails for the Governor of the Falkland Islands. I asked him to send me surveyors. I did not send any cable, because the captain of the "Lafonia" told me

(Deposition of Pierre Lalande.)

there was no telegraphic communication with the outside world.

Q. What was done in response to your communication which you sent to the Governor of the Falkland Islands?

A. A surveyor came on the 13th of December.

Q. What was the name of that surveyor?

A. Thomas.

Q. What did he do?

A. He came on board, and he made a general survey of the cargo.

Q. Did he make any report of his survey to anybody?

A. He made a provisional report, and he gave it to Mr. Thompson, Receiver of Wrecks, who arrived on the 16th of December.

Q. Have you seen that report, Captain?

A. Yes, sir.

Q. Do you remember when this Captain Thomas was on board, whether he used the pumps of the vessel?

A. Yes, sir.

Q. If he states in his report which he made to Mr. Thompson, that after half an hour of pumping with both pumps on the 14th inst., no reduction of the water was made, have you any explanation of that fact, that no reduction was made, or is that fact correctly stated?

A. It is. When the surveyor ordered the pumps to be worked, it was nearly high water, and the ship was beginning to straighten up, and I called his attention to that fact in the presence of my officials,

(Deposition of Pierre Lalande.)

and I told him while the starboard side of the ship was lying on the bottom, the water did not come in the hold any longer, but a small quantity of water came in the hold as soon as the ship was straightened up. At this time there was about 14 feet of water in the hold, but there was a difference [149] between the level of the water in the hold and the level of the sea outside. At high water there was 24 feet of water where the ship was, that is on the starboard side.

Q. Do you know whether Mr. Thomas made any other reports in connection with your ship

A. Yes, sir, he made several other reports for surveys that he made at Port Stanley.

Q. Have you seen those reports? A. Yes, sir.

Q. Did you do anything with reference to either one of those reports yourself?

A. I wrote to my owners about the reports, and it went to Montevideo.

Q. What did you write to your owner about it?

Mr. PAGE.—I object to that. The letter speaks for itself. The reports should be in evidence, if they are referred to, so that we can examine them.

Mr. HENGSTLER.—We do not really need those reports. You can offer them in evidence if you want to.

Mr. HENGSTLER.—Q. You did not protest to the Governor of the Falkland Islands against these reports made by Mr. Thomas? A. No, sir.

Q. Now, a little while ago you stated that you left Roy Cove on the 17th of December? A. Yes, sir.

(Deposition of Pierre Lalande.)

Q. Where did you go at that time?

A. I went to Port Stanley with the intention of sailing for Montevideo, or Punta Arenas.

Q. Will you please identify this document (handing)? A. Yes, sir.

Q. What is the document which I hand you?

A. It is a certificate of the Bureau Veritas attesting that the ship had been passed on survey at Rotterdam.

Mr. PAGE.—Does this come out of the captain's possession?

Mr. HENGSTLER.—It is a certified copy.

Q. Is this one of the ship's papers, Captain?

A. Yes, sir. [150]

Q. You carried it in your ship to San Francisco, did you, from Rotterdam?

A. It is a certified copy of the one I have on board of my vessel.

Mr. HENGSTLER.—We offer it in evidence.

Mr. PAGE.—I object to it as hearsay.

(The document is marked Respondent's Exhibit No. 3.)

Mr. HENGSTLER.—We can offer the original.

Mr. PAGE.—You can treat it as the original.

Mr. HENGSTLER.—Q. Now, Captain, you testified that you left Port Stanley on December 17th?

A. Yes, sir.

Q. And when did you return on board of the vessel?

A. I stayed 28 days in Montevideo, waiting instructions of the owners, and during that time I was

(Deposition of Pierre Lalande.)

trying to ascertain what means of salvage could be furnished in Montevideo or Buenos Ayres.

Q. And what success did you have?

A. I asked the firm of Lusage at Montevideo, who refused to do any salvage at any price. At Buenos Ayres I applied of the firms of Meanovitch and Delfino.

Q. What success did you have with these firms?

A. The firm of Delfino refused to entertain the salvage, and the firm of Meanovitch would not undertake anything at less than £8,000.

Q. What did you do then?

A. I received a cable from my owners, informing me that the Salvage Association of London had arranged the salvage with Messrs. Brown & Blanchard of Punta Arenas, and giving me orders to go to that place to join the salvage expedition.

Q. What did you do then?

A. I took the steamer leaving the following day, and proceeded to Punta Arenas. I received a cable from my owners, authorizing me to sign a contract of salvage, this contract of salvage being salvage according to the cable exchange between the Salvage Association of London, and Messrs. Brown & Blanchard [151] of Punta Arenas of the one part, and those cable exchanges between my owners and myself. I left Punta Arenas with the steamer "Lovart," and all the gear necessary for the salvage. Do you want the date exactly?

Q. The date you left Punta Arenas? A. Yes.

Q. No. Do you remember when you got back to

(Deposition of Pierre Lalande.)

Roy Cove to your vessel from Punta Arenas?

A. It was the 11th of February that I left Punta Arenas, I think.

Q. Verify it by your log-book, so that we can get it exactly right.

Q. (After examination.) I left Punta Arenas on the 6th of February.

Q. And when did you return on board the "Duc d'Aumale"?

A. I returned on board the "Duc d'Aumale" on the 10th of February.

Q. What was done after you got back on board the vessel?

A. As soon as we arrived, we started to put in place the pump.

Q. What pump are you referring to?

A. The steam pump furnished by the firm of Brown & Blanchard.

Q. What then?

A. We put in place the steam pump to connect this pump with the boiler on board the ship, and started to pump on the same day in the afternoon.

Q. How long was that pumping kept up?

A. We pumped two hours.

Q. Two hours on that day? A. Yes, sir.

Q. Did you pump the day after?

A. No, sir; on the same day a diver went down below to inspect the hull of the ship.

Q. What did he find?

A. He could not find anything, the ship was laying in the mud to the height of 1 meter 40.

(Deposition of Pierre Lalande.)

Q. Can you tell, Captain, when the ship left Roy Cove? A. The 13th of February.

Q. What was done between your return to the ship and the 13th of February to enable her to continue to proceed on this new voyage? [152]

A. On the 11th we continued to pump, and we were fixing up posts and gear to hold the ship in the middle of the stream.

Q. What else. Tell us all that was done.

A. We finished pumping on the 13th of February, and left Roy Cove immediately.

Q. Did you leave under your own sail?

A. No, sir; in tow of the steamer "Lovart."

Q. That is, the salvage steamer?

A. Yes, sir; and anchored in Whaler Bay at 9 o'clock on the 13th of February.

Q. And what was your destination at that time?

A. Port Stanley.

Q. When did you arrive at Port Stanley?

A. On the 16th or 17th of February.

Q. Then, how long was the vessel at Port Stanley?

A. We left again on the 5th of April.

Q. Now, Captain, state what was done at Port Stanley with reference to any surveys made on the condition of the vessel and the cargo.

A. I first asked a survey in order to find out if the ship could proceed on her voyage to San Francisco, the diver having found nothing at Stanley.

Q. Whom did you ask for that survey?

A. The Governor of the Falkland Islands.

Q. And what was the result of that request?

(Deposition of Pierre Lalande.)

A. They would not allow me to go out of Port Stanley without having a tugboat. We made application afterwards to know if we could proceed to Montevideo to complete the repairs.

Q. To whom did you make the application?

A. To the Governor of the Falkland Islands.

Q. Do you know whether or not the Governor appointed any surveyors to report on the conditions?

A. The Governor appointed Captain [153] Thomas, the captain of the "Margaret," and a carpenter, Mr. Biggs.

Q. Did those gentlemen make a survey?

A. Yes, sir; they came on board.

Q. They came on board? A. Yes, sir.

Q. Were you present when they surveyed the vessel? A. Yes, sir.

Q. Do you know whether or not they made any report of their survey?

A. They made a report, and they could not agree, and decided that the ship could not leave Stanley.

Q. Do you know on what ground they made that decision?

Mr. PAGE.—We object to that question. The documents ought to be produced.

Mr. HENGSTLER.—Q. It was a written report? A. It was a written report.

Q. Did you receive that report, or receive any copy from the surveyors of the report?

A. I received a copy.

Q. Will you please look at this document, and

(Deposition of Pierre Lalande.)

state what it is (handing)?

A. It is a survey that I asked of the Governor of the Falkland Islands after coming back from Punta Arenas.

Q. To be made where?

A. In order to find out if, with a steam pump, the ship was in a condition to proceed to Montevideo.

Mr. HENGSTLER.—I offer this in evidence, and ask to have it marked Respondent's Exhibit 4.

(The document is marked Respondent's Exhibit 4.)

Q. I forgot to ask you a question with reference to the time you were still at Roy Cove. I want to ask you the reason why you did not discharge at Roy Cove 1200 tons, or any portion of the cargo?

A. Because of the difficulty of the operation.

Q. Explain the difficulty. Explain it in some details.

A. We could not throw the coke in the water because we would have blocked the river. [154]

Q. Captain, please state the reason, if there was any particular reason, why no cargo was discharged at Port Stanley.

A. For two reasons. The first one was, that it was impossible to sell any coke at Port Stanley, and the cost of discharging would have been very high. The second reason was, that leaving Port Stanley after having discharged a certain amount of the cargo, the ship would have had only 600 tons of pig iron in the lower hold, and the coke

(Deposition of Pierre Lalande.)

not going high enough in the hold in order to balance, the ship would have been in a very bad condition to navigate in those regions.

Q. Are those all the reasons? A. Yes, sir.

Q. What did you do after you received this final report of Captain Thomas which I just handed you?

A. I made arrangements to get ready to leave Port Stanley.

Q. And when did you leave Port Stanley?

A. The 5th of February.

Q. And that was on the way to what place?

A. Montevideo.

Q. When did you arrive at Montevideo? You can refer to the log-book to refresh your memory.

A. The 17th of February.

Q. What means of propulsion was used on the way from Port Stanley to Montevideo? A. Sailing.

Q. Your own sail? A. Yes, sir.

Q. Did you use any tug?

A. Merely to leave the harbor.

Q. The rest of the way you went under your own sail? A. Yes, sir.

Q. Did the vessel leak on the way to Montevideo?

A. No, sir.

Q. Did she leak at any time after that again?

A. We stayed thirteen days at Montevideo, during which time the ship was not leaking.

Q. And she began to leak again?

A. She began to leak on the 30th day of April.

[155]

Q. Do you know, Captain, any reason why she

(Deposition of Pierre Lalande.)

ceased to leak, and the leak commenced afterwards?

A. I think that a rivet was gone, and the hole of the rivet beame stopped up by sea-weed or kelp. This kelp kept growing during the time that the ship was in salt water, and after a little time in fresh water this kelp died and fell out of the hole.

Q. How long did you remain in Montevideo?

A. Fifteen days.

Q. On what day did you leave Montevideo?

A. The 2d of May.

Q. On the way to what place? A. Buenos Ayres.

Q. On what day did you arrive at Buenos Ayres?

A. The 6th of May.

Q. Please state the reason why you remained in Montevideo, and why you left Montevideo, and repaired to Buenos Ayres with your vessel?

A. We were inquiring which was the best for the operation of the ship, such as the drydock, discharging, storage, reloading or *sail* of the cargo.

Q. And what did you find out? What was the result of your inquiries?

A. We could not sell the cargo anywhere, either at Montevideo or Buenos Ayres. Moreover, the cost of discharging and storage, and reloading the cargo being cheaper at Buenos Ayres than Montevideo, I decided after advice from my owners to proceed to Buenos Ayres.

Q. Did you receive any instructions from anybody to sell the cargo, Captain? A. From my owners.

Q. State what attempts you made both in Monte-

(Deposition of Pierre Lalande.)

video and Buenos Ayres to find a purchaser for the cargo.

A. With the help of my consignee, Mr. Cristofsen, I made inquiries of all the dealers in coke, asking them if they would agree to buy any or all of the cargo. As I could find nothing in Montevideo, I went myself to Buenos Ayres, where I made inquiries with a view [156] of selling the cargo.

Q. What steps did you take in Buenos Ayres?

A. I went with Mr. Cristofsen at Buenos Ayres to the principal dealers in coal, and I asked also of the French Consul, if he could give me some information, but I could not find anything.

Q. Did you receive any instruction from the owners of the cargo during this time with reference to the disposition of the cargo? A. No, sir.

Q. Not at Montevideo? A. Not at Montevideo.

Q. Nor at Buenos Ayres? A. No, sir.

Q. At any time? A. No, sir.

Q. Did you receive any instructions regarding the disposition of the cargo from the underwriters of the cargo?

Mr. PAGE.—I object to the question. Who are the underwriters of the cargo, so that he knows who the underwriters of the cargo were.

Mr. HENGSTLER.—Q. Do you know who the underwriters were?

A. Mr. Van Eck, the agent for the underwriters at Buenos Ayres.

Q. Did Mr. Van Eck have any communication with

(Deposition of Pierre Lalande.)

you that led you to think he had any interest in the cargo?

Mr. PAGE.—We object to that as calling for the conclusion of the witness, as to what Mr. Van Eck had in his mind as to his own position with reference to the cargo.

A. He never wrote me.

Mr. HENGSTLER.—Q. Did he ever speak to you and tell you that he had any interest in the cargo?

A. I went to see him on my arrival.

Q. At what place?

A. With Mr. Cristofsen of Buenos Ayres.

Q. What did he tell you?

A. He told me that I had done well to come to Buenos Ayres where the cost of the operation was less than at Montevideo, but there was no hope to sell the cargo at Buenos Ayres any more than at Montevideo. [157]

Q. Now, Captain, will you tell us what was done with the cargo while you were at Buenos Ayres?

A. The cargo of coke was placed in storage. We kept on board the pig iron. After discharging the coke, we went in drydock and reloaded the cargo after the completion of the repairs inside and outside of the ship.

Q. Did you discover what the cause was of the leak of the vessel when she was in drydock?

A. We discovered one rivet entirely gone.

Q. Where was that rivet?

A. That rivet was about one meter forward off the mizzen mast.

(Deposition of Pierre Lalande.)

Q. How near the keel of the vessel?

A. About one foot off the keel.

Q. And on which side, the starboard or portside?

A. The starboard.

Q. Was that the rivet that you referred to in your explanation a little while ago? A. Yes, sir.

Q. What other damage was discovered in drydock that would explain the leaking of the vessel?

A. Several other rivets were leaking, especially one very close to the foremast, which was very loose.

Q. What other damage, Captain, if any, was there that would explain the leaking?

A. A plate near the stern-post was bent in, and all the rivets were loose.

Q. Anything else? A. Nothing else.

Q. Was there no damage to the plates?

A. The plates in the aft of the ship were bent. The cement was broken in the butt end of several plates.

Q. Was there any survey made of the vessel while she was in drydock?

A. One survey was held by the surveyor to the Bureau Veritas, and two other surveyors.

Q. What was the name of the surveyor of the Bureau Veritas? A. Vu Cassovitch. [158]

Mr. PAGE.—Q. Is that the same survey that was made under the auspices of the French consul?

A. No, sir.

Q. At whose request was that survey made in the drydock?

A. At the request of the consignee of the ship.

(Deposition of Pierre Lalande.)

The agent of the Bureau Veritas made a survey without any request:

Q. Did the French consul take any part in the survey of the vessel?

A. He appointed two other surveyors.

Q. What are the names of the two surveyors whom the French consul appointed?

A. Mr. Potel, a civil engineer, and Mr. Paoli, captain of the French steamer "Montpelvouse."

Q. Have you seen the report which was made by the two surveyors appointed by the French consul?

A. Yes, sir.

Q. Did you see a copy of that report?

A. No, sir.

Q. The captain did not give you a copy of that report? A. No, sir.

Q. Please look at this document, and tell us what it is and how you received it.

A. It is a report of a survey made by Paoli and Potel.

Q. Made when the ship was in drydock?

A. Yes, sir.

Q. And how did you come into possession of this paper? A. It was given to me here.

Q. Here in San Francisco? A. Yes, sir.

Q. By whom? A. It was given to me by you.

Q. You have never seen it before? A. No, sir.

Q. Let me ask you again: Have you seen this report before?

A. I have read it before it was sent to San Francisco.

(Deposition of Pierre Lalande.)

Q. Where did you read it?

A. At Buenos Ayres.

Mr. HENGSTLER.—I offer this together with the translation to be hereafter furnished, and ask to have it marked Respondent's Exhibit 5. [159]

(The document is marked Respondent's Exhibit 5.)

I also offer this document marked "14" in evidence as Respondent's Exhibit 6.

(The document is marked Respondent's Exhibit 6.)

Q. That is a report made as it purports by A. Bonhomme and A. Potel on May 30th, 1908, before the vessel went into drydock? A. Yes, sir.

Q. Now, Captain, in this last report, I notice a statement to the effect that on Saturday the 16th, "We asked two men of the crew by the name of Chalm and Palvadeau, who stated that while the vessel was on the beach in the Falkland Islands in the night of the 15th and also the nights of the 17th and 18th of December, 1907, one end of the fire hose was hanging out from the port hole of the store room of the vessel into the sea, and the other end was in the store room so that a syphon was formed in this manner." What have you to say, Captain, with reference to this hearsay statement in this report?

A. I asked an inquiry to the French consul to this effect with regard to this matter.

Mr. PAGE.—We make no point with reference to this rumor or report.

(Deposition of Pierre Lalande.)

Mr. HENGSTLER.—Then I withdraw all inquiry upon the subject.

Q. On what day did the vessel leave the drydock?

A. June 8th.

(An adjournment is here taken until to-morrow, Wed., Dec. 30, 1908, 10 A. M.)

Wednesday, December 30th, 1908.

PIERRE LALANDE recalled—direct examination resumed.

Mr. HENGSTLER.—Q. Captain, after leaving the drydock, what was done with reference to the vessel or the cargo?

A. As soon as the vessel left the drydock, the repairs in the interior of the vessel [160] were completed, the changing of the ceilings, and the scraping and the painting of the hull inside, and then the cargo was taken on board of the vessel.

Q. To go back for a moment; did the leaking of the vessel continue after it had commenced to releak in Montevideo? A. Yes, sir.

Q. How long did it continue?

A. It continued until the moment that the vessel was aground at Buenos Ayres.

Q. How long was she aground at Buenos Ayres?

A. About three days.

Q. And during how much of that time did the vessel stop to leak, if you have any record of that?

A. She did not leak while she was aground, and two days after she floated, we went to the drydock, and the vessel did not leak during that time.

Q. How do you explain the fact that the vessel did

(Deposition of Pierre Lalande.)

not leak during that time?

A. The holes were filled by the mud, and the pressure of the water was not so great as before, the vessel drawing only 9 feet.

Q. Now, you stated that after the vessel came out of drydock, her cargo was restowed, did you not?

A. Yes, sir.

Q. Was the stowage affected in the same way in which she had been stowed before, or was there any difference?

A. The pig iron was not stowed in the same way as before.

Q. In what way was the pig iron stowed before when the ship left Rotterdam?

A. We had 600 tons of pig iron stowed between the main hatch and the after-hatch, and 60 tons in the between-decks in the center.

Q. I show you this diagram. Is that a correct representation of the stowage of the vessel when she left Rotterdam (handing)? A. Yes, sir.

Q. Is this stowage plan one of the regular ship's papers? A. Yes, sir. [161]

Q. I will show you now Respondent's Exhibit 2, and ask you to state what this paper is.

A. It is a report of the surveyors who overlooked the stowage of the cargo. It was given to me by my consignee, Mr. Vandersie, before I left Rotterdam.

Mr. HENGSTLER.—I offer this stowage plan in evidence, and ask to have it marked Respondent's Exhibit 7.

(Deposition of Pierre Lalande.)

(The stowage plan is marked Respondent's Exhibit 7.)

Q. Do you personally know the surveyor whose name is signed to the stowage report? A. No, sir.

Q. Have you ever met him? A. No, sir.

Q. Do you know, Captain, if any custom exists in Rotterdam relative to the examination of the stowage of vessels that are loaded in Rotterdam?

Mr. PAGE.—We object to the question unless it is first shown that the captain has been in Rotterdam long enough, and has known enough of the business of Rotterdam to enable him to speak with knowledge as to what the customs of Rotterdam are.

Mr. HENGSTLER.—I asked him if he knew such a custom existed.

Mr. PAGE.—How can he know it unless he lived among them. You can not prove a custom except by somebody who has lived there, or has been there so often in the shipping trade that he knows of the customs. As I understand, the captain arrived there after the ship was loaded.

Mr. HENGSTLER.—Q. Had you been in Rotterdam before this occasion when you joined the “Duc d’Aumale” in the port of Rotterdam? A. No, sir.

Q. Do you know if any custom exists in European ports generally, relative to the examination of the stowage of vessels which have been loaded in those ports, from your past experience? [162]

A. I don't know the general rules of the port.

Q. How long have you had experience in the stowage of vessels?

(Deposition of Pierre Lalande.)

A. I have been seven years officer on board of vessels of the same kind as the "Duc d'Aumale."

Q. Have you had previous experience with the stowage of cargo of this character, pig iron and coke?

A. No, sir.

Q. Have you any opinion with reference to the method in which this vessel was stowed at Rotterdam?

A. My opinion is that the vessel was perfectly well stowed in Rotterdam.

Q. What are the reasons for your opinion?

A. I think that the man who overlooked the cargo was so capable that the vessel's hold was full of cargo and in good trim.

Q. What man do you refer to?

A. The overlooker of the cargo, and the surveyor of the cargo.

Q. What is his name? A. Plisson.

Q. Is that the only ground upon which you base your opinion that the cargo was well stowed?

A. And also in the way in which the ship behaved at sea.

Q. Have you any other ground for your opinion?

A. No, sir.

Q. Do you know from your past experience how the weight of cargo should be distributed in the vessel in stowing the cargo?

A. On board of a vessel of the "Duc d'Aumale's" type, 2,200 tons must be taken in the lower hold, and 800 tons in the between-decks, with a full cargo, but we cannot take 800 tons of heavy cargo resting on the

(Deposition of Pierre Lalande.)

beams of the between-decks.

Q. How many tons of cargo were in the between-decks on this last voyage, about?

A. About 760 tons.

Q. When the cargo was restowed at Buenos Ayres, how was it stowed?

A. We had one pile of pig iron on the fore-part of the after-hatch, about 350 tons; another pile on the after-part of the [163] after-hatch, and a small lump just abaft of the foremast, and the coke was spread all over the cargo as before. The 60 tons of pig iron was in the same place as at Rotterdam, in the between-decks.

Q. The only part of the pig iron that was changed in the stowage was the part in the hold?

A. Yes, sir.

Q. Now, Captain, why was this change in the stowage made at Buenos Ayres?

A. This change was advised by the surveyors. Myself, I did not see any objection to it, all the more because it was an economy of time.

Q. Who were the surveyors that advised the change? A. Mr. Van Eck, and Captain Schutz.

Q. Who was the latter gentleman, Captain Schutz, and by whom was he appointed?

A. He was sent by Mr. Van Eck. He was a sea captain.

Q. A captain of what vessel?

A. He had no vessel. I met him at the Delfino firm. I do not know if he belongs to that firm or not.

Q. How do you know that he was a sea captain?

(Deposition of Pierre Lalande.)

A. He was introduced to me as such.

Q. Is that the only reason you know he was a sea captain, simply from his title? A. Yes, sir.

Q. Is Mr. Van Eck, the other surveyor, a captain?

A. I do not know.

Q. What was his business, as far as you know?

A. He was representing the Hamburg Underwriters.

Q. Did those gentlemen come together when the survey was made?

A. Yes, sir, they came to see the vessel in drydock.

Q. Did you think the change in the stowage was necessary? A. No, sir.

Q. Did you notice any difference in the way the vessel behaved [164] after the change was made on her way from Buenos Ayres to San Francisco from the way in which she had behaved before?

A. No noticeable difference.

Q. Did anybody else recommend the restowage of the vessel?

A. The surveyors appointed by the French consul advised also to restow the iron in the way I have described.

Q. Did they advise that the iron be spread more over the hold than it was before? A. Yes, sir.

Q. What is the document which I hand you now, Captain?

A. It is a certificate of seaworthiness delivered by the Consul of France at Buenos Ayres after the survey of Mr. Potel.

Q. Delivered to whom? A. To myself.

(Deposition of Pierre Lalande.)

Q. After you received the certificate of seaworthiness, what did you do?

A. As soon as the repairs were completed, and all the steps taken, I went to sea.

Q. Did anything happen on the voyage from Buenos Ayres to San Francisco?

A. No, sir; nothing in particular.

Q. When did you arrive in San Francisco?

A. On the 19th of November.

Q. To whom did you deliver the cargo after your arrival?

A. To Meyer, Wilson & Co. They had a bill of lading to order.

Q. In what places was the cargo delivered, and how much cargo at each place?

A. I delivered 94 tons of coke, and 664 tons of pig iron in San Francisco, and the remainder of the cargo of coke at Oakland pier.

Q. How many tons did you deliver in that remainder? A. 2,069 tons at Oakland wharf.

Q. Captain, I want to ask you again whether you have an opinion referring to the necessity of the change made in the stowage of the pig iron at Buenos Ayres? [165]

A. I found that it was better stowed as it was before.

Q. Why?

A. Because the cargo was stowed on the widest part of the hold where it could be taken.

Q. You are referring to the pig iron?

A. Yes, sir. If we could put the pig iron in trim it

(Deposition of Pierre Lalande.)

would be better to stow that cargo in the widest part of the ship, which is the center, but a vessel of the "Duc d'Aumale's" type being very hard to put down by the stern, we are compelled to take the cargo a little abaft of the widest part of the ship, which was done at Rotterdam. As it was restowed, we had a pile on the fore-part of the vessel, and we were compelled to take another pile right in the stern of the ship in a place where a heavy cargo would strain the vessel very much.

Q. In your opinion, was the strain on the vessel greater or less after the cargo was restowed in Buenos Ayres as compared with the strain as she was stowed in Rotterdam?

A. In my opinion, there was a heavier strain on her afterwards than there was before.

Q. How do the pumps, if you know, which are installed in your vessel, the regular pumps of the ship, compare with pumps in all French vessels of the same type?

A. All the pumps I have seen up to now were of the same type as those on board the "Duc d'Aumale."

Q. How do the pumps compare with the pumps in other French ships, as far as the size of the pumps is concerned?

A. The same size. I never exactly measured them.

Q. But your opinion is that they are of the same measurement? A. Yes, sir.

Q. How did the pumps behave when you worked them on the different occasions that they had to be

(Deposition of Pierre Lalande.)

used? A. They worked well.

Q. Captain, after the ship was leaking, and the leak was first noticed, and you used the pumps, can you tell us how much water per hour the ship was making? [166]

A. The water was rising in the hold about one centimeter every hour.

Q. And how much time was necessary for the purpose of pumping the ship out?

A. We pumped 20 minutes in the morning, and 20 minutes in the evening—40 minutes every day.

Q. Can you estimate or tell us how great the volume of water is, corresponding to a rise of one centimeter?

A. I never asked myself how much it was, but I think that one centimeter means about 500 or 600 liters. (After calculation.) One centimeter of water makes about six tons.

Cross-examination.

Mr. PAGE.—Q. Captain, how many tons were there altogether in your cargo when you left Rotterdam? A. About 2,660 tons.

Q. How many tons did you have in the lower hold?

A. 600 tons of pig iron, and a little less than two-thirds of the coke, which is equal to about 1,900 tons.

Q. That is, 1,900 tons altogether in the lower hold, or more?

A. About nineteen hundred tons altogether in the lower hold.

Q. How much would that leave in the between-decks?

(Deposition of Pierre Lalande.)

A. It would leave 760 tons in the between-decks.

Q. How do you ascertain the amount of that weight?

A. The space in a ship like the "Duc d'Aumale" in the between-decks is about one-third of the entire interior space of the ship.

Q. When you left Rotterdam, was the lower hold full up to the between-decks, or was there a space?

A. The lower hold was entirely full.

Q. And also the between-decks entirely full?

A. Yes, sir.

Q. In your opinion, a ship of the type of the "Duc d'Aumale," as I understood you, should carry about 800 tons in the between-decks as against 2,200 tons in the lower deck? A. Yes, sir. [167]

Q. And the reason, as I understand you, that the "Duc d'Aumale" was not loaded in that proportion was that her beams in the between-decks would not allow of her carrying a larger amount of cargo than she actually did?

A. She could not take any more in the between-decks.

Q. What was there to prevent her carrying more in her between-decks; were the beams not strong enough?

A. The beams were strong enough, but it would produce a strain greater on the ship.

Q. How did you get from Rotterdam to Brest? Under sail, or under tow? A. Under tow.

Q. You had good weather during all of that time?

A. Yes, sir; fair weather.

(Deposition of Pierre Lalande.)

Q. Were you sounding your pumps during that time every day? A. Every day.

Q. Was the ship making any water at all?

A. No water.

Q. After you left Brest, I suppose you kept on sounding your well every day?

A. Yes, sir; twice a day.

Q. And up to the time that the leak was discovered, had the ship made any water whatever?

A. None whatever.

Q. You kept your log regularly, of course?

A. Yes, sir.

Q. Your officers made the entries in the usual course?

A. The officers made the entries after every watch, and I go over it and sign it every day.

Q. This log-book of which you have spoken, does it correctly state the circumstances accompanying the voyage, and the weather, the sailing of the ship, and the distance travelled, as it purports to do?

A. Yes, sir.

Q. On what day did you discover the leak?

A. The 28th of September. [168]

Q. Up to that time there was no water at all in the well, as I understand?

A. A little water, but very little indeed.

Q. The ship was not making any water?

A. No, sir.

Q. Why didn't you keep any record at all of the soundings before that time in the log-book?

(Deposition of Pierre Lalande.)

A. The log-book does not show any amount of water because there was none to report, but at the end of each watch, the officer has written down "Pumps free."

Q. On what day did you leave Brest?

A. 24th of September.

Q. The weather from the time you left Brest up to the 28th day of September, when the leak was sprung, was as fine weather as it was possible to have at sea, was it not?

A. The two or three first days. After that we had a breeze starting at the west, going to southwest, getting fresh, and shifting to the northwest.

Q. But you had no stormy weather up to that time—up to the 28th? A. I have not examined the log.

Q. Look at your log, and tell us whether the weather was not the ordinary weather that a sailing vessel encounters without any stormy weather.

A. During the nights of the 26th and 27th we had bad weather.

Q. Describe the weather as it is given in the log.

A. From 8 o'clock to midnight of the 26th we had bad weather.

Q. Is this entry in your log correct: "From midnight of the 26th to midnight of the 27th, weather squally; nice breeze; swell; all sails set." In the second watch, "Squally weather; nice breeze; all sails set." "In the third watch, "Squally weather; nice breeze; all sails set." In the fourth watch, "Squally weather of little strength; a fine breeze; all sails set." In the next watch, "Squally weather; nice breeze;

(Deposition of Pierre Lalande.)

all sails set." Next watch, "Cloudy; fine breeze; a few squalls; all sails set." The next [169] day; "From midnight of the 27th to the midnight of the 28th." In the first watch, "Squally weather; strong rain; the wind blows to the southwest, and shifts to the northwest; gaff topsail and main-jib torn, royals and upper top-gallant sails and staysails and spanker taken in." In the next watch, "The same kind of weather; strong breeze; a large swell from the northwest; the top-gallant sails taken in; unbent the main jib; violent squalls; strong winds; heavy sea; set the top-gallantsails and mizzen staysail." Next watch, "Cloudy weather and squally; strong breeze; heavy sea from the west, northwest; the same sail as during the preceding watch." Next watch, "Squally weather; strong breeze; furled the mainsail at six o'clock." Next watch on the same day, "The same weather; very strong swell; violent squalls." The next day, "Midnight of the 28th to midnight of the 29th." In the first watch, "Fine weather; some squalls; strong breeze becoming less at the end of the watch." Second watch, "Fine weather; fine breeze; set the mainsail; royal, spanker and staysail." In the next watch, "Fine weather; fine breeze; all sails set." In the next watch, "Squally weather; the sea falls more and more; all sails set; tested the steam gear; found an increase of water in the hold; sounded 23 centimeters; cleared the pumps." In the next watch, "Fine weather, the breeze softens; all sails set." The next watch, "Fine weather; light breeze; all sails set."

(Deposition of Pierre Lalande.)

And on that day did you make any notation in your own handwriting on the log-book with reference to the discovery of water in the hold?

A. Yes, sir; I wrote at the foot of the log not to fail to sound at every watch, and to give an account to the captain; if the water rises slowly and regularly, they must pump in the morning at 7:20 and in the evening at 4'clock. [170]

Q. Does that log correctly state the facts as they occurred at the time with reference to the character of the weather? A. Yes, sir.

Q. During all of this time, or any part of this time, was your ship rolling? A. Yes, sir.

Q. Was that the natural roll of an ordinary ship in that kind of weather, or was it an extraordinary rolling?

A. The rolling was caused by this wind which started at the southwest, and shifted to the northwest, the sea having become very heavy by the cross seas, and when the wind shifted to the northwest, the wind decreased, and the vessel not being stayed by the sails rolled heavily.

Q. Is it not usual if a vessel rolls very heavily, that is more than is expected of her, to make an entry in the log that the ship has been rolling?

A. Generally, but it was neglected.

Q. Was there a laboring of the ship prior to the leak starting, which was unexpected or unusual?

A. Yes, sir; the day after that night, the wind shifted from the southwest to the northwest.

Q. Was the laboring of the ship upon that occasion

(Deposition of Pierre Lalande.)

very extraordinary?

A. The ship labored less than she did later after that storm at the Falkland Islands, but she did labor very much.

Q. Is it not usual for any ship to labor more or less in a cross sea without making water?

A. Certainly; the "Duc d'Aumale" itself did it many times, probably, but this time she sprang a leak.

Q. Then, that must have come from some weakness of the ship before she started, did it not? There must have been some weakness.

A. I don't think so.

Q. How can you account for the ship springing a leak in weather which was fine, all excepting during one or two days at the most, and that weather not very bad, no storms? [171]

A. I cannot give any other explanation.

Q. Then the only explanation that you have to give is that the ship strained in this kind of weather, and started a leak. That is the only explanation you can give? A. Yes, sir.

Q. After the leak was started, how long did the good weather continue?

A. Variable weather, up to the storm that we had in the west of the Falkland Islands.

Q. About what date was that?

A. The 22d of November.

Q. There was no other bad weather, was there, up to that time?

A. We had one small gale in the latitude of Montevideo.

(Deposition of Pierre Lalande.)

Q. The rest of the time you had fine weather, had you not? A. Yes, sir.

Q. Now, the log records stormy weather on the page marked "From midnight of the 22d to midnight of the 23d of November." Up to that time, had there been any noticeable change in the amount of the water that the ship took in?

A. I have always noticed that the water was rising one centimeter every hour.

Q. What you mean is, that there was a uniform amount of water coming in to the ship each day up to the 22d of November, which amounted to about one centimeter per hour? A. Yes, sir.

Q. When the storm of the 22d came on, did it come on suddenly at midnight of that day, or was it coming on for some time on the previous day?

A. It came progressively. It began with north wind, the gale fell, shifting to the northwest and getting fresh.

Q. The storm really began to come on, then, on the last quarter of the 21st, namely from 8 o'clock at night to midnight? A. Yes, sir.

Q. And in the second quarter on the morning of the 22d, the discovery was made that the water had increased abnormally. What hour was that second watch?

A. From 4 to 8 o'clock in the morning of the 23d.
[172]

Q. And after that time, it was impossible, you say, to have any control over the water with the pumps.

A. We could not control the water, but we were

(Deposition of Pierre Lalande.)

making an examination of the pump-well.

Q. But you were unable to pump the water out excepting a small part of it? A. Yes, sir.

Q. You could not control it? A. No, sir.

Q. Now, Captain, during that time, when the leak increased so largely, what sail was your ship carrying? Can you tell by looking at your log?

A. The foresail and two lower topsails. We had lost the jib and lower staysails.

Q. How long before?

A. We lost the staysails at midnight, and the fore staysail between midnight and 4 o'clock.

Q. How many miles an hour were you making during that watch? A. About 4 knots.

Q. In what direction was the wind then?

A. Southwest.

Q. Was that a free wind or a head wind?

A. It was a head wind.

Q. Now, before this last storm took place, had the vessel been rolling very much?

A. Not much, excepting in a storm on the 5th of November.

Q. In your opinion, Captain, was the hole that was discovered in the ship's hold, and which was caused by the loss of a rivet, sufficiently large to account for the immense amount of water that got into the ship immediately that she began to have bad weather?

A. I think there was something else.

Q. Is it not your opinion from all that you have been able to ascertain, that the laboring of the ship caused the butt ends of the plates to separate or to

(Deposition of Pierre Lalande.)

open, and let water in between the plates?

A. I think that the ship made a little water by the butt ends.

Q. That little water that you speak of made by the butt ends added [173] to the water that would come in by the rivet hole, would those two together be sufficient to account for the immense amount of water that came in so rapidly when you struck the heavy weather? A. Yes, sir.

Q. Is it your opinion, Captain, that the water did actually come in in part by the rivet hole before arriving at Roy Cove? A. Yes, sir.

Q. And how large was that rivet hole in diameter or in circumference?

A. It was a rivet of 23 millimeters in diameter when the ship was new.

Q. Was it any larger after the ship became older?

A. No, sir, it was the same.

Q. Now, when the ship was making, as you said a little while ago, in your opinion, about one centimeter an hour of water, was it your opinion that at at that time the rivet was already out?

A. The rivet was not out.

Q. Have you any opinion what it was that was causing the ship to leak up to the time that the rivet fell out?

A. My opinion is that the rivet started to get loose in the first storm of the 27th of September, and that the same rivet jumped out in the storm of the 23d of November.

Q. Now, after the ship reached Roy Cove, and was

(Deposition of Pierre Lalande.)

on the mud, and in the kelp, as I think you said, and after she left Roy Cove on her voyage to Montevideo, did she make water as she had been making water before? A. No, sir.

Q. Did she make any water at all? A. No, sir.

Q. Have you any reason to account for her not making water, excepting that the hole had been filled with kelp? A. Kelp and mud.

Q. Is it not more probable in your opinion that the reason she did not make water was because the mud had filled up the butt ends in such a way that no water would come in, and you did not have any [174] bad weather after leaving Roy Cove? A. No, sir.

Q. Can you account for the other rivets which you found to be defective after the vessel was put on dry-dock? A. It came from the straining of the ship.

Q. At the same time as the first one, or after she went on shore?

A. I cannot state positively if it was before or after.

Q. It is impossible to say when any of them happened. Nobody can say. A. That is so.

Q. How about plates that were dented? When was that done, and how did it happen, in your opinion, if you know?

A. It was found out in drydock, but I cannot state if it was caused by the stranding at Roy Cove, or by the working of the ship before.

Q. Now, when the ship did go on the drydock at Buenos Ayres, you found that the butt ends of the plates were more or less injured so that they would

(Deposition of Pierre Lalande.)

let water in, did you not?

A. The cement was broken at the butt ends.

Q. Was that all repaired before you started on your new voyage from Buenos Ayres? A. Yes, sir.

Q. Was it recemented, or was caulking done?

A. They did not caulk. They put a steel blade between the plate, and caulked that blade.

Q. And after that, there was not leakage in that?

A. No, sir.

Q. Did you have any bad weather after you left Buenos Ayres?

A. Yes, sir, but the ship was always running with a free wind.

Q. You, personally, would like to have avoided going around Cape Horn from Buenos Ayres, and would have preferred to go by way of Australia, would you not? A. Yes, sir.

Q. What was the reason of that?

A. To make more miles on account of the bounty.

[175]

Q. Did you go around Cape of Good Hope and Australia? A. Yes, sir.

Q. Do you recollect what the cost of repairs was at Buenos Ayres of the ship's hull so as to stop the leaking? A. No, sir; I don't remember that.

Q. Do you remember that the repairs that were necessary to stop the leaking did not cost more than \$400 paper money? A. No, sir.

Q. Look at the document, to be marked Libelant's Exhibit "A" and state what it is (handing).

A. It is a general survey of Captain Paoli and the

(Deposition of Pierre Lalande.)

engineer Potel, appointed by the French Consul.

Mr. PAGE.—I will offer this document in evidence and asked to have it marked Libelant's Exhibit "A."

(The document is marked Libelant's Exhibit "A.")

Q. You said, I think, that in accordance with the advice of these gentlemen, you changed the stowage of the pig-iron, so that the pig-iron in the lower hold, instead of being stowed all together, was spread over the lower hold of the ship. Did the surveyors who so advised you state that the reason for this was that the ship had strained too much on the first part of the voyage when the iron was all in one place?

A. Yes, sir; I said that.

Q. Captain, I understood you to say that it was necessary to place 600 tons of iron back of the main hatch in the lower hold in order to permit of the rest of the ship being filled up with the coke. Is that right? Did I understand you right? A. Yes, sir.

Q. What would have been the effect, if you had placed more of the iron in the between-decks?

A. The ship would have had the proper stability to have placed more than 60 tons of pig iron in the between-decks.

Q. But in that case, would not the ship have had more nearly a third of the cargo in the between-decks, and two-thirds in the [176] lower hold than in the other way which you actually followed?

A. I never said that it was necessary to put one-third of the cargo in the between-decks.

Q. But would that not have been the fact, that you could have secured one-third of the weight of the

(Deposition of Pierre Lalande.)

cargo in the between-decks by putting some more of the pig-iron there than by leaving it all in the lower hold excepting 60 tons?

A. The ship must have a good stability to go to sea, and also having a cargo well stowed in case of rolling.

Q. If you had put some more of the iron in the between-decks, could you have carried as much of the coke as you did? A. Yes, sir.

Q. How do you arrive at the quantity of cargo that there was in the between-decks, and the quantity that there was in the lower hold, if you did not join the ship until it was nearly loaded?

A. According to the plan of the cargo that was handed to me, and also the particulars that they gave me.

Q. Were the particulars given to you in writing, and by whom?

A. The information given by the overlooker.

Q. What information did he give you?

A. He told me exactly how the cargo was stowed.

Q. Did he give you the number of tons in the lower hold, and the number of tons in the between-decks?

A. Yes, sir, as far as the pig-iron was concerned.

Q. How about the coke?

A. Knowing, myself, that the space of the between-decks being one-third of the whole capacity of the ship, and the pig iron taking already a certain amount of space in the lower hold, I calculated that there was a little more than one-third of the cargo in the between-decks, about 700 tons.

(Deposition of Pierre Lalande.)

Q. Do you know what is the cubic capacity of your between-decks? [177]

A. I have not the figures in my memory.

Q. Where have you those figures?

A. I have got them aboard.

Q. Did you consult them for the purpose of ascertaining how much cargo you had in the between-decks?

A. Yes, sir, but it was not necessary, as the cargo was loaded at that time.

Q. Have you the information now on board of your ship showing what the cubic capacity of the different holds is? A. I think so.

Q. What are they in; in a book, or letter, or the ship's papers? A. In the ship's papers.

Mr. PAGE.—I would ask that that document, whatever it is, be produced.

Mr. HENGSTLER.—We can produce that document.

The WITNESS.—Anyhow, we could give you the total cubic capacity of the ship. We have a book here which gives the total cubic capacity of the ship.

Mr. PAGE.—I want the two separate.

Mr. HENGSTLER.—Q. Is there anything in the ship's papers to show what the cubic capacity of the between-decks, and the cubic capacity of the hold separately are?

A. I don't know if in the ship's papers they give the cubic capacity of the between-decks and the lower hold separately.

Mr. PAGE.—Q. Where do you get the information

(Deposition of Pierre Lalande.)

as to which you have testified with reference to the capacity of the two separate things?

A. I have seen myself on board of other ships of the same type as the "Duc d'Aumale."

Q. What have you seen?

A. I have calculated the cubic capacity of the lower hold and the between-decks.

Q. In what way? Have you taken the measurements yourself? A. Yes, sir.

Q. On what ship?

A. The French ship "La Perouse." [178]

Q. What connection had you with that ship?

A. I was second mate, and mate on board.

Q. As second mate and mate, you have measured off the between-decks and also measured off the hold? A. Yes, sir.

Q. What was the measurement of that ship?

A. I don't know exactly.

Q. What is the beam or width of your ship at the widest part? A. A little more than 12 meters.

Q. What is her length?

A. 85 meters in the keel.

Q. What occasion was there for your measuring the "La Perouse"?

A. In my spare time, in order to instruct myself.

Q. Since you have been in San Francisco, in any spare time, have you measured the space in the "Duc d'Aumale"? A. No, sir.

Q. Now, go back to Buenos Ayres. Had you any communication with the shippers or owners of the cargo of the ship with reference to what should be

(Deposition of Pierre Lalande.)

done with it? A. No, sir.

Q. You had none yourself? A. No, sir.

Q. Did you have any instructions from the owners of the ship to sell the cargo? A. Yes, sir.

Q. Was that by cable? A. Yes, sir (producing).

Q. Do you refer to the cable of April 28th?

A. Yes, sir.

Q. Does not that cable refer only to a discharge and *sail* of enough of the coke to make the vessel lighter in order to go to San Francisco?

A. The telegram to which I refer mentions also the sale of all the cargo.

Q. I will show you the telegram of April the 28th, and ask you to say whether that refers to anything excepting the sale of a portion of the cargo?

A. It refers to the lightening of the vessel, and selling a part of the cargo, and afterwards to a sale if more advantageous. [179] I have interpreted the cable to mean the sale of the whole cargo.

Mr. HENGSTLER.—Q. At the time you received it, you interpreted the cable to mean the sale of the whole cargo? A. Yes, sir.

Mr. PAGE.—I will read into the record the cable referred to which is in the following words:

“In accord with experts act for the best looking to the eventuality of moving to San Francisco with an auxiliary pump or a lightening of coke and sale if more advantageous.”

It is signed by the owners of the ship.

Q. Now, Captain, I ask you the question, if all the coke had been sold, would you have gone to San

(Deposition of Pierre Lalande.)

Francisco with nothing but the 600 tons of pig iron?

A. I don't know. I had to await the instructions of my owners.

Q. You did not hear anything from your owners regarding taking another kind of cargo from Buenos Ayres to San Francisco? A. No, sir.

Q. How large a place is Buenos Ayres?

A. A little more than a million, or so.

Q. Had you ever been there before? A. No, sir.

Q. Are there any foundries there, or iron works that use coke?

A. I did not hear anyone speak of them.

Q. Did you inquire to find out whether there were foundries when you spoke about selling the coke?

A. I spoke to Mr. Cristofsen.

Q. Your consignee?

A. Yes, sir; and I went with him to different merchants.

Q. How long was the coke under water?

A. From the 21st of November up to the 17th of February, about.

Q. How much was in the ship's hold during that time?

A. When the ship was put afloat again, it was about 15 feet. [180]

Q. So that about 15 feet of the coke was submerged all the time?

A. 15 feet from the bottom of the ship up.

Q. That would be 15 feet of the cargo, would it not? A. About 13 feet.

(Deposition of Pierre Lalande.)

Q. And when this cargo was discharged at Buenos Ayres it was taken to warehouse?

A. No, sir; in an empty place.

Q. Out in the open? A. Out in the open.

Q. Do you know who took it out, who discharged it? A. Gavassa & Co.

Q. Was the discharge paid for at the rate of so much a ton? A. Yes, sir.

Q. Was the reloading of the ship paid for at so much a ton? A. Yes, sir.

Q. So that the people who handled the cargo, handled it and were paid for it in its wet condition with all the additional weight? A. Yes, sir.

Q. Do you know what the expense was?

A. I don't remember exactly.

Q. Captain, did I ask you, or did Mr. Hengstler ask you, whether you had ever superintended the loading of a cargo of this kind before? A. No, sir.

Q. You never have? A. No, sir; I never have.

Q. How long have you been going to sea?

A. I have been going to sea about 8 years.

Redirect Examination.

Mr. HENGSTLER.—Q. Captain, was there any flaw on the between-decks of your vessel during this voyage that we speak of here?

A. No, sir, only an alleyway on the side.

Q. What was the coke stowed in the between-decks resting on?

A. On the coke which was in the lower hold. The ship was stowed [181] solid.

(Deposition of Pierre Lalande.)

Q. When the ship was in drydock at Buenos Ayres, did you yourself inspect the damage to the ship?

A. Yes, sir.

Q. I think you stated this morning that in your opinion the leak of the ship was produced partly by the rivet hole spoken of here, and partly by some defect in the butt ends, did you not? A. Yes, sir.

Q. In your opinion, how did the inflow of water through that leak compare with the quantity of water which entered the vessel through the butt ends between the plates?

A. The water could only enter in a small quantity by the butt ends, because when the cement was gone, there was still a little caulking, and the water was stopped by the butt straps inside of the vessel.

Q. How are these butt straps located with reference to the plates?

A. The plates touched each other by the end, and the butt straps cover the seams, and join solidly the two plates with rivets.

Q. Of course, this missing rivet was replaced in drydock in Buenos Ayres, was it not?

A. Yes, sir.

Q. And what was done there with the loose rivets that you testified to?

A. Several of them were replaced, and others being less damaged were caulked.

Q. What was your relation to the French Consul after you arrived at Buenos Ayres?

A. As soon as I arrived at Buenos Ayres, I gave him full particulars of the vessel's situation. I

(Deposition of Pierre Lalande.)

handed to him my reports and the Consul himself appointed two surveyors to make a general survey of the vessel.

Q. Why did you apply to the French Consul?

A. Because it was my duty to do it.

Q. Your duty under the French law?

A. Yes, sir.

Q. Had you any right under the French law to do anything without [182] authorization by the French Consul in Buenos Ayres?

A. No, sir; the Consul has a right to interfere for all that concerns matters of general average.

Q. That refers, does it not, of course, to repairs to the vessel?

A. Yes, sir, for all matters concerned.

Q. Does it refer to the discharge of the cargo, and warehouse, and reloading of the cargo?

A. Yes, sir, I took in my cargo after being ordered by the surveyors of the Consul to do so.

Q. With reference to this bid of Gavassa Bros. To whom was that bid made? A. At the Consul's.

Q. And who accepted it? A. Yes, sir.

Q. What is this paper which I now hand you (handing)?

A. It is an abstract of the minutes of the French Chancellerie at Buenos Ayres concerning the adjudication of discharging, warehousing and reloading of the cargo of coke.

Q. By whom is this document signed?

A. By the French Consul at Buenos Ayres.

Q. That came from the ship's papers?

(Deposition of Pierre Lalande.)

A. Yes, sir.

Mr. HENGSTLER.—I offer it in evidence.

(The document is marked Respondent's Exhibit 8.)

Q. Now, Captain, Mr. Page asked you with reference to a cable which you received from your owners while you were in Montevideo, and which seems to be dated the 27th of April. You know what cable I mean? A. Yes, sir.

Q. Please state what you understood by this cable.

Mr. PAGE.—He has already stated that. He says he understood it meant that he was to try and sell the whole cargo, and I read the whole cable into the record.

Mr. HENGSTLER.—That is all right, if he said that. [183]

Recross-examination.

Mr. PAGE.—Q. After your ship got to Buenos Ayres, did you receive any cable instructions of any kind in regard to selling your cargo there?

A. No, sir.

Q. And after that time, you did not attempt to do anything there. You were satisfied with what you had already done? A. Yes, sir, I tried again.

Q. Alone, or in company with somebody else?

A. Always with Mr. Cristofsen, and Mr. Vie, Inspector for the Underwriters.

Q. Did you go to any foundries, or did you simply go to some merchants?

A. I went to see the merchants only, and a civil engineer promised to help me. He told me two days

(Deposition of Pierre Lalande.)

later that there was nothing to be done.

Q. What was the name of the engineer, do you remember?

A. I do not remember at present—Andre.

Q. What countryman was he, a Frenchman?

A. Yes, sir; a Frenchman.

Q. Was he in business there?

A. I think he was employed in the English Railway Company.

Mr. PAGE.—It is understood that if there is anything that we want to recall Captain Lalande for after looking at the log, we can recall him?

Mr. HENGSTLER.—Yes.

Deposition of Alphonse Rio, for Respondent.

ALPHONSE RIO, called for the respondent, sworn.

Mr. HENGSTLER.—Q. What is your business?

A. I am a shipmaster, acting overlooker of the Compagnie Maritime Francaise. [184]

Q. What are your duties as such overlooker?

A. In Europe, when a vessel of our company arrives, we proceed at once to the harbor where she is. We help the captain to send the crew away, and take charge of the vessel while she is in port, overlooking the cargo and general repairs in the harbor, and of course when she goes in drydock we take great care to see that everything is in order.

Q. Have you any duties with reference to loading the vessel?

(Deposition of Alphonse Rio.)

A. Yes, sir; one of our first duties is to see that the cargo is well stowed.

Q. How many such overseers have your company?

A. There is only one overlooker, and generally two acting overlookers who are shipmasters on furloughs.

Q. And who is the chief superintendent?

A. Captain Plisson, who had charge of the "Duc d'Aumale" when she was at Rotterdam.

Q. Do you know Captain Plisson yourself?

A. I do.

Q. How long have you known him?

A. I have known him for 12 years.

Q. Does he go to sea, or does he attend to his duties as overseer exclusively?

A. Yes, sir; he does not go to sea at all.

Q. You do not know of your personal knowledge what Mr. Plisson did in Rotterdam with reference to the "Duc d'Aumale"?

A. Yes, sir, I do, because—

Mr. PAGE.—Q. Were you there?

A. No, sir; but he told me.

Q. That is not your personal knowledge. That is what somebody else told you.

A. He himself told me. I will explain why he told me.

Q. No, never mind that.

Mr. HENGSTLER.—We will have to take Mr. Plisson's deposition in regard to that.

Q. Do you know what the duties of Captain Plisson were with reference with the "Duc d'Au-

(Deposition of Alphonse Rio.)

male" while she was at Rotterdam. What were his duties?

A. I described them when you asked me what was the [185] duty of an overlooker in port.

Q. Are you familiar with the construction of the "Duc d'Aumale"?

A. Yes, sir; I have been surveying one of the same type of vessels when she was being built, and I took charge of the vessel as her captain for four years.

Q. What was her name?

A. "Admirale de Cormulier." When I left her, I took in charge the same type of vessel, the "Surcouf," both vessels being built in the same yard as the "Duc d'Aumale" and of the same type.

Q. How do the pumps which are installed in the "Duc d'Aumale" compare with the pumps in the other two vessels?

A. They are exactly the same.

Q. From your familiarity with this type of vessel, are you able to calculate approximately the volume of water which would correspond to a rise of one centimeter in the hold of this vessel?

A. I can within at least about 100 meters more or less.

Q. What, in your opinion, is the volume of water corresponding to an increase to the height of one centimeter?

A. I think it will be between 1,400 liters, and 1,600 liters. I can make a calculation right now.

Q. What it is in tons of water?

(Deposition of Alphonse Rio.)

A. One ton and a half. One ton of water is 1,000 liters.

Q. In what time would that ton come in?

A. In one hour. The Captain said this morning that the water rose in the hold about one centimeter per hour.

Q. I hand you the stowage plan of the deck, respondent's Exhibit 7. You are familiar with it. You have examined it? A. Yes, sir.

Q. You have had experience in the towage of vessels? A. Yes, sir.

Q. How long have you had experience?

A. I have been ten years master, and I was six years mate before. [186]

Q. In your opinion, was this vessel properly stowed when she left Rotterdam? A. Yes, sir.

Q. What is your opinion based upon; have you any reasons for your opinion; if so, state them.

A. Yes, sir; she could be better stowed, if the pig iron was stowed in the center of the vessel where she is the widest, but in that case, the vesssl having to take a very light cargo of coke, her holds could not be full, because she would be too much by the head. For that reason, they had to stow the pig iron a little abaft the center of the vessel, but in this case the pig iron being stowed right between the main-hatch and after-hatch, it was where the vessel was widest aft of the center of the vessel, and it could not be otherwise. The coke in this case is like ballast on board of other ships. If the vessel had to take a full cargo of coke, she would have to take ballast, and she would

(Deposition of Alphonse Rio.)

have to take about the same amount in weight as the quantity of pig iron she had in, about 600 tons, and that ballast should have been taken in the after-part of the ship, in order to fill her holds with coke; and about the stability of the vessel, it was a good stowing because the coke being a very light cargo, the center of gravity of the vessel is placed very high.

Q. You mean it would be placed very high if it were only coke? A. Yes, sir.

Q. Or it is placed very high as it is?

A. As it is now, it is placed as it ought to be, but if it was with a light cargo like coke, the center of gravity of the vessel would be placed very high. The pig iron stowed in the lower part of the vessel brings lower the center of gravity and gives stability to the vessel.

Q. Do you think it would have been an improvement on the stowage of the vessel if more pig iron was placed in the between-decks than [187] was placed in this case? A. No, sir.

Q. Why not?

A. Because placing more pig iron in the between-decks you raise again the center of gravity, and the stability of the vessel is not sufficient.

Q. You know that one Mr. Van Eck in Buenos Ayres recommended when the vessel was restowed, that the pig iron should be distributed more over other parts of the vessel than it was in this case. What is your opinion with reference to this recommendation?

(Deposition of Alphonse Rio.)

A. If I had been master on the vessel, I would not have obeyed that recommendation. First, they stowed the pig iron in the fore part of the ship, and in doing so, to balance the vessel they had to stow a lump of pig iron right in the stern of the vessel. I saw it here in San Francisco.

Q. What is your objection to stowing pig iron in the stern of the vessel?

A. The stern of the vessel is like a wedge, and with any cargo at all in the vessel, the vessel being light, and the stern being a wedge, there is a weight pressing the vessel down in the stern, and the vessel is only held straight by the keel, and their consolidation, but the vessel being light the stern tends to go down in the water all the more when you put some cargo in that place, there is a deformation of the vessel.

Q. Was the stability of the vessel affected by the stowing of the heavy pig iron in the stern of the vessel?

A. The stability is not affected, but when a ship labors under great strain in that heavy weather, she feels it all the more when the cargo is placed on the stern or on the fore part of the vessel. Both parts of the ship are very much strained when you put heavy cargo there.

Q. If I understand you correctly, the stability is less if you place the heavy part in the stern or the forecastle. [188]

A. No, sir; the stability is the same.

Q. But it has an effect upon the straining of the vessel?

(Deposition of Alphonse Rio.)

A. Yes, sir; the vessel is straining very much when a heavy cargo is stowed on the after part of the vessel.

Cross-examination.

Mr. PAGE.—Q. And the same effect more or less is felt if there is a heavy weight stowed in the vessel abaft the middle place which you said would be the best place?

A. There is more strain than if the cargo was stowed in the center, but very little less because the vessel is very wide on that part.

Q. But in any case, the nearer the middle such a heavy weight would be placed in your opinion the better the stowage would be?

A. The nearer the center, the better the stowage.

Q. And the only objection there was in this case to stowing the heavy part of the cargo in the middle of the ship was that if you stowed it there you could not have carried as much cargo of coke as you otherwise did?

A. It is the only objection, which objection is the same for every ship.

Q. If the heavy weight had been more near to the middle, the straining would have been less; how much less you could not tell?

A. Very little.

Q. Still you say it would be better stowage?

A. It would not be better stowage, but the strain would be a little less; very little.

Q. Do you recognize that there is any rule affecting stowage which requires the cargo in the between-decks to be not less than one-third of the whole?

(Deposition of Alphonse Rio.)

A. For heavy cargoes. For cargoes of the same kind and very heavy, it is the general rule to stow one-third of the cargo between-decks, and two-thirds in the lower hold, but this is not compulsory with every ship. It is the difference in the [189] building of the ships. Some ships are narrower and some wider. Some roll very much, and some a little.

Q. The wider the ship is, the more stiff she is. Is that not the rule with heavy cargo in her?

A. No, sir.

Q. If a ship is a narrow ship, is she not naturally crank?

A. Yes, sir; she needs a great deal more cargo in the lower hold.

Q. If a ship is wide, she is less crank?

A. Yes, sir.

Q. Therefore, she is stiffer than a narrow ship?

A. It depends on the cargo you put on board.

Q. Without any cargo?

A. If she is wide, she can go without any ballast in still water.

Q. If a ship is wide enough to be a stiff ship, the more heavy cargo you put in the lower hold, the stiffer she is necessarily?

A. Wide does not mean necessarily a stiff ship. I know vessels that are very wide and that are not stiff at all. I call a stiff ship a vessel that generally rolls abruptly.

Q. That is the result of stiffness, is it not?

A. When she rolls abruptly, yes.

(Deposition of Alphonse Rio.)

Q. That is the result of the cargo that it put in her?

A. It depends on the character of the ship very often.

Q. It depends more on the cargo that is put into her?

A. Of course, when there is too much difference between the weight in the lower hold and the between-decks.

Q. Do you know the cubic capacity of the between-decks of the "Duc d'Aumale"?

A. I could not say exactly.

Q. Do you know the cubic capacity of the lower hold?

A. No, sir. I think the lower hold is to the whole hull as two to three.

Q. In other words, the between decks is about one-third more? Yes, sir. [190]

Q. So that if a ship is fully laden from the floor up to her deck, with the same kind of cargo, she is carrying one-third in the between-decks, and two-thirds in the lower hold? A. Yes, sir.

Q. Where you have a very large weight like 600 tons covering a very small floor space on board of the ship, does that not necessarily strain the ship when all the rest of the floor space of the ship is covered with a lighter kind of cargo?

A. Do you refer to this plan of the stowage of the "Duc d'Aumale"?

Q. Yes. I refer to the space that was occupied ac-

(Deposition of Alphonse Rio.)

cording to that plan of 600 tons of pig iron.

A. That small space was about 63 feet long—20 meters.

Q. How high was it?

A. I could not say. I did not see it.

Q. How wide?

A. About 12 meters. It was 9 meters at one end, and 11 meters at the other.

Q. The height could be calculated, could it not, by the size of the pig iron? A. Yes, sir; it could be.

Q. Now, I ask you after you have made that explanation, whether all of that iron being in that comparatively restricted space did not create a greater strain on that part of the ship than the rest of the cargo did, which was a light material over the ship?

A. No, sir, I don't think so.

Q. Supposing that you placed a comparatively similar amount of pig iron on one end of this table, don't you think that the strain would be a great deal more on the supports of this table than if you spread it over the table?

A. I do not accept this comparison with a vessel. A table reposes on the floor, and the vessel is resting on the water all over her hull. I will not accept that comparison of a table and a vessel.

Q. You said a few moments ago that to place a very much smaller [191] amount of pig iron nearer the stern of the ship had the effect of pressing her down, and causing her to labor and strain?

A. Yes, sir.

Q. Yet you will not admit that a much greater

(Deposition of Alphonse Rio.)

amount of pig iron placed a few feet forward where the ship is wider will effect no strain upon the ship in heavy weather. Is that so??

A. No, sir, it is not. The pig iron stowed in the stern part of the vessel was stowed where the vessel had about 9 feet wide.

Q. That was a very small amount of pig iron.

A. Yes, sir, it was. I cannot say how much it was.

Q. It was a very small amount, 9 feet?

A. 9 feet wide, but about 10 to 12 meters long, and about 5 feet high. This pig iron, as I told you, on the "Duc d'Aumale," which we refer to, was stowed where the vessel had 8 meters at one end, and 9 meters at the other end of the pile. The vessel was supported by a great deal of water underneath.

Q. Can you tell from the stowage plan, how wide that pile of pig iron was—across the ship, I mean?

A. No, sir; I told you I have been master of the same kind of ship as the "Duc d'Aumale." I know where the pig iron was stowed by the plan; and I know the dimensions pretty accurately of the vessel where I have been master.

Q. You do not know whether the pig iron was stowed from side to side of the ship, or whether there were passages in between? A. It must be—

Q. You do not know?

A. The surveyor's report said—

Q. Never mind what the report said.

A. I only take it from the plan.

Q. You cannot tell from the plan anything excepting the comparative length of the pile?

(Deposition of Alphonse Rio.)

A. Yes, sir.

Q. And the height?

A. And I am sure the pig iron was stowed from [192] side to side. It could not be otherwise.

Q. That is only guesswork?

A. Yes, sir, because the pile was covered with boards and mats separating the coke from the pig iron.

Q. That you assume also?

A. I have seen them here.

Q. But not at Rotterdam?

A. The surveyor in his report said—

Q. Never mind what the surveyor said. Have you ever carried cargoes of this nature, pig iron and coke, in your own experience?

A. No, sir, I have only overlooked one. I never carried such a cargo.

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

I, James P. Brown, Esq., a United States Commissioner of the Northern District of California, do hereby certify that the reason stated for taking the foregoing depositions is that the testimony of the witnesses Y. Perrot, Pierre Lalande and Alphonse Rio is material and necessary in the cause in the caption of the said depositions named, and that they are bound on a voyage to sea and will be more than one hundred miles from the place of trial at the time of trial.

I further certify that on Tuesday, December 29th,

and Wednesday, December 30th, 1908, at 10 o'clock A. M., I was attended by Charles Page, Esq., of the firm of Messrs. Page, McCutchen & Knight, Proctor for the Libelants, L. T. Hengstler, Esq., Proctor for the Respondent, F. Henry, Esq., who, by stipulation was sworn to act as Interpreter, and by the witnesses who were of sound mind [193] and lawful age, and that the witnesses were by me first duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth in said cause; that said depositions were, pursuant to the stipulation of the proctors for the respective parties hereto, taken in shorthand by Clement Bennett, and afterwards reduced to typewriting; that the reading over and signing of said depositions of the witnesses was by the afore-said stipulation expressly waived.

Accompanying said depositions and annexed thereto and forming a part thereof are Libelants' Exhibit "A" and "Respondent's Exhibits 1 to 7," both numbers inclusive, introduced in connection therewith and referred to and specified therein. Such exhibits are endorsed by me with my official title.

I further certify that I have retained the said depositions in my possession for the purpose of delivering the same with my own hand to the United States District Court for the Northern District of California, the Court for which the same were taken.

And I further certify that I am not of counsel nor attorney for any of the parties in the said depositions and caption named, nor in any way interested in the event of the cause named in the said caption.

IN WITNESS WHEREOF, I have hereunto subscribed by hand at my office in the City and County of San Francisco, State of California, this 15 day of January, 1912.

[Seal]

JAS. P. BROWN,

U. S. Commissioner, Northern District of California,
at San Francisco.

[Endorsed]: Filed Jan. 15, 1912. Jas. P. Brown,
Clerk. By Francis Krull, Deputy Clerk. [194]

Testimony Taken in Open Court.

(Title of Court and Cause.)

Honorable R. S. BEAN, Judge.

Tuesday January 16th, 1912.

Wednesday, January 17th, 1912.

Thursday, January 18th, 1912.

COUNSEL APPEARING.

For the Libelants: IRA A. CAMPBELL, Esq., of
the firm of Messrs. PAGE, McCUTCHEN,
KNIGHT & OLNEY.

For the Respondent, L. T. HENGSTLER, Esq.

(This libel now came on for hearing in its regular order on the calendar, and the following proceedings were had:) [195]

Mr. CAMPBELL.—If the Court please, this is a suit brought by Meyer, Wilson & Co., who are the holders of bills of lading on a cargo of coke and pig iron which was shipped on board the French bark “Duc d’Aumale” from Rotterdam in September, 1907.

The testimony will show that she left Rotterdam, I think, about the 19th or 20th of September and towed from there down to Brest, and left Brest on her voyage for San Francisco on the 24th of September.

The COURT.—Of last year?

Mr. CAMPBELL.—This all appears in the depositions which are filed. After she had been out some two days, the 26th, she got into what we call fair weather and the breeze increased a little bit during the 27th, the 28th and the 29th, but she continued in what libelants contend to be fair weather. During that time however she sprung a leak, so much so that the captain found it necessary to work his pumps 40 minutes a day to keep her free from water. She did not turn back however to a port of refuge for the purpose of repairs, but continued on her voyage, and thereafter, when she was in the vicinity of the River Platte off of the southern end of the South American Continent in a very stormy region she encountered much severer weather than she had on the 28th and 29th.

It appears from the record that during all this time the leak continued, and the weather at that time was so bad apparently that he could not get at his pumps to work them. Finding the water increasing in the hold he called a consultation of his crew and they decided to run for the Falkland Islands, which I think were somewhere to the southeast of the position he was in at that time. He then got his vessel before the wind and made for the Falkland Islands. While she was running [196] in that way, he says,

the leak was less than it was then when he was working her in a head wind, which we contend becomes a very significant point in the case, showing the source of the leak and the cause of the leak. She reached the Falkland Islands and was beached. There was no wrecking apparatus at that place, and after communicating with his owners by mail he left and went to Montevideo by steamer; there, after being in cable communication with his owners he went down to Punta Arenas in the Straits of Magellan and joined a wrecking outfit "which went from that point over to the Falkland Islands. The vessel was eventually recovered. The water was pumped out of her and she was towed by this wrecking tug to Montevideo. That was in April. So that she had been filled with water from December to April. Naturally this coke became thoroughly saturated with salt water during that period. From Montevideo she was taken down to Buenos Ayres and was there docked. Surveys were held and the surveys showed a certain character of damage; for instance, it was revealed that a rivet was gone from a position about a foot from the keel and a meter forward from the mizzenmast of the vessel. It also appeared that her butts worked and as a result leaked, so that it became necessary to put in a steel blade.

It also appears from the survey reports which were offered in the depositions that they found 200 to 300 rivets leaking throughout the bottom of the vessel. There was also some other damage from her being ashore, a certain bent plate about her stern which unquestionably came from the damage ashore.

She was then reloaded. After completing the repairs which cost something like \$400 she started on her voyage to [197] San Francisco. Instead of coming around by the way of Cape Horn she came by the way of the Cape of Good Hope, one reason being as the master stated, that by going the longer distance he would earn more bounty under the French law. She eventually arrived in San Francisco and the consignees of the cargo refused to pay the freight on it. The cargo was subsequently sold at public auction. Part of the coke brought a cent a ton and part 5 cents a ton over and above the freight and the duty.

The loss for which the libelants are claiming is the loss arising from the damage to the coke by reason of the salt water saturation. We are also asking for a recovery because of the loss of the market on the iron, and I think some slight damage to the iron. There is also a general average statement which I do not think has been completed as yet, but will be made up at the conclusion of this case in which these consignees under the bond that they gave, will probably be required to contribute in general average to the expenses incident to the recovery of the vessel after her getting into trouble at the Falkland Islands.

Our contention of course is that the evidence shows that the vessel was unseaworthy when she started on her voyage; that in the eyes of the law she was unseaworthy because of the fact that she was not properly loaded and was not sufficient in her hull to stand the ordinary perils or the ordinary incidents which would be encountered on the voyage. It is on

these grounds that we ask recovery in this suit.

Mr. HENGSTLER.—I think, Mr. Campbell, it is fair to add here that there are two suits before the Court. There is [198] another suit brought by the owners of the ship against Meyer, Wilson & Co. for recovery of the freight; that no part of the freight has been paid by Meyer, Wilson & Co. The principal issues in both cases are the same. I suppose that the defense which is made to the recovery of the freight involves the same defense of unseaworthiness of the vessel. The two actions are consolidated.

Mr. CAMPBELL.—That is true. I think the testimony in the one suit will be the testimony in both suits. I have agreed with Mr. Hengstler that if at the close of my testimony he finds he wants to call anyone in rebuttal, that he may have the opportunity of doing so, and if it is not convenient before your Honor leaves I am willing it should be taken by deposition and made a part of the record.

The COURT.—Very well.

Mr. HENGSTLER.—It may be necessary to rebut the testimony of the experts,—I believe they are all experts that are to be called, by depositions to be taken in foreign countries. It is understood between Mr. Campbell and myself that if I consider it necessary these depositions may be taken.

The COURT.—Very well.

Mr. CAMPBELL.—It is also understood that the testimony may be taken in shorthand and that the expense may be divided half and half?

Mr. HENGSTLER.—Yes. [199]

Testimony of Hiram Coalfleet Davison, for Libelants.

HIRAM COALFLEET DAVISON, called for the libelants, sworn.

Mr. CAMPBELL.—Q. What is your business?

A. Shipmaster.

Q. Are you at the present time master of any vessel, Captain?

A. Yes, sir, the “Lord Templeton.”

Q. What character of vessel is she?

A. She is a bark.

Q. Wooden or iron or steel? A. Steel.

Q. A steel bark? A. Yes, sir.

Q. How many masts? A. Three.

Q. What is her tonnage? A. 2,048 tons.

Q. What is her deadweight capacity?

A. About 3,240 tons.

Q. How long have you been going to sea?

A. I have been going to sea since 1869.

Q. What was the last voyage that you have just completed? A. Between Newcastle and this port.

Q. Newcastle, New South Wales?

A. Newcastle, New South Wales and San Francisco.

Q. How long have you been a Master?

A. Since 1883.

Q. Since 1883? A. Yes, sir.

Q. In what character of vessels have you sailed?

A. In seagoing vessels, long voyage vessels.

Q. Long voyage vessels? A. Always.

Q. Have you ever been around Cape Horn, Captain? A. Yes, sir; only once.

(Testimony of Hiram Coalfleet Davison.)

Q. As master? A. As master.

Q. Have you ever been around there as a sailor apprentice? A. No, sir.

Q. Over what waters have you sailed?

A. Pretty nearly all parts of the globe. [200]

Q. Have you ever been in bad weather?

A. Occasionally.

Q. Have you ever been in the Atlantic trade at all?

A. Yes, sir, the first 8 or 10 years of my going to sea was in the North Atlantic trade.

Q. What character of weather ought you ordinarily to expect in the Atlantic Ocean during the months from September to November?

A. Well, sometimes you have pretty bad weather and sometimes it is not. All the winter weather is bad in the North Atlantic.

Q. Is that the kind of weather that you ordinarily expect to meet in the winter time in bad weather?

A. Yes, sir. We are always prepared to meet that weather at any time in the North Atlantic.

Q. What do you call bad weather such as you would expect to meet?

A. I am not very good in describing bad weather.

Q. You can describe to us something of the effect that you expect to have in a sea in bad weather?

A. Yes, sir, we expect to have a very bad sea.

Q. What effect does it have on the vessel. What is the nature of the sea that you expect?

A. In what way do you mean?

Q. Do you ever have any water on deck that would cause your vessel to roll?

(Testimony of Hiram Coalfleet Davison.)

A. We have water on deck most of the time in bad weather, that is, if the vessel is loaded. If she is light it is not there. Very often we have water on deck, that is, spray.

Q. Is it an unusual or extraordinary occurrence to have water come on the deck of a sailing vessel where she is loaded?

A. Oh, no. You have that if you have any wind at all. You have a little water on the deck. It may be spray. It does not amount to anything. [201]

Q. If you have ordinary bad weather that you expect to encounter, what water do you have on deck?

A. We have considerable on deck. A good deal depends upon the vessel. Some vessels are worse than others—wetter than others.

Q. What kind of a sail do you usually carry when you are encountering the bad weather that you ordinarily expect at sea?

A. Well, in bad weather in a gale of wind, her lower top-sails are usually the sails that we keep there. We keep them until they blow away. When the canvas won't stand it we do not have anything there.

Q. Captain, I want to show you a photograph. I think the record will show in this case that this vessel was what we call a three-masted bark, and while this is a picture not of this bark but a picture of the bark "Peru" I want to use it simply for a mere graphic illustration of some testimony. I will show it to Mr. Hengstler first. Now, Captain, I want you to name for me the sails on the foremast of that three-masted bark.

(Testimony of Hiram Coalfleet Davison.)

A. That is the foresail, and that is the lower top-sail (pointing).

Mr. CAMPBELL.—I will ask to have this marked for identification Libelants' Exhibit "A."

(The photograph is marked "Libelants' Exhibit 'A' for Identification.")

Q. Now, Captain, referring to "Libelants' Exhibit 'A' for Identification," I will ask you what you call the sail marked "No. 1" on the picture.

A. That is the foresail.

Q. And "No. 2" is what?

A. It is the fore lower top-sail.

Q. And "No. 3" is what?

A. The fore upper top-sail.

Q. The sail that would take the place of "No. 4" dropping down from the yard? [202]

A. That is the fore topgallant-sail; in that case she is a single topgallant-sail.

Q. And "No. 5" would be what?

A. Fore-royal.

Q. On the main mast what is "No. 6"?

A. That is the mainsail.

Q. And "No. 7"? A. The main lower top-sail.

Q. And "No. 8"? A. Main upper top-sail.

Q. And "No. 9"? A. Main topgallant-sail.

Q. And "No. 10"?

A. That would be the main royal.

Q. "No. 11" is what? A. The spanker.

Q. Then what would you call "No. 12" and "13," in the stay-sail?

A. "12" is the main topmast stay-sail.

(Testimony of Hiram Coalfleet Davison.)

Q. And "No. 13"? A. Main topgallant-sail.

Q. Now, Captain, when your ship is trimmed down for the kind of bad weather that you expect to meet at sea what sails do you usually carry?

A. We don't take the sails in until the bad weather comes, as a rule. With a gale of wind usually those two lower top-sails.

Q. If I may lead you, that is to say, that all the sails, the foresail, mainsail and topgallant-sails and royals are all furled? A. Furled.

Q. The upper top-sails are furled and you carry your lower top-sails alone? A. Yes, sir.

Mr. HENGSTLER.—And have the lower top-sails alone.

The COURT.—Q. What number would those be on this picture, "2" and "7"? A. "2" and "7."

Mr. CAMPBELL.—Q. State whether or not it was an unusual occurrence at sea to have to furl your sails so as only to carry your lower top-sails.

A. Yes, sir; it is a very common occurrence in bad weather in the North Atlantic in winter.

Q. What time of the year did you go around the Horn? [203]

A. I think it was October or November.

Q. You think it was October or November?

A. Somewhere about that time.

Q. Were you in command at that time?

A. Yes, sir.

Q. In what character of vessel?

A. She was a bark, very much like that one, like the picture (pointing).

(Testimony of Hiram Coalfleet Davison.)

Q. What was the name of it?

A. The "Battle Abbey."

Q. She is an old British bark, is she not?

A. Yes, sir.

Q. What was your port of departure?

A. We were going from Victoria to Cape Town.

Q. Did you come back in her? A. Yes, sir.

Q. You came back the other way?

A. I came back the other way.

Q. By the way of the Cape of Good Hope and the South Pacific? A. Yes, sir.

Q. Did you encounter any bad weather around the Horn during that voyage?

A. No, sir; we had fine weather all the way around.

Q. In running from the Pacific to the Atlantic during those months do you have a fair wind or head wind?

A. In those months we had more fair wind than we do head wind. It is the winter, the south winter when you have the most westerly winds, that is, the head winds going east.

Q. In the summer months around the Horn—

A. (Intg.) That is the southern summer.

Q. From September to April? A. Yes, sir.

Q. The prevailing winds are from west to east?

A. They are any way—yes, they are northwest to south southwest. [204]

Q. Would a vessel coming from the South Atlantic to the South Pacific around the Horn in those months expect to encounter head winds?

A. They expect to encounter them any time of the

(Testimony of Hiram Coalfleet Davison.)

year, more so in the southern summer.

Q. Have you ever carried a cargo of coke and pig iron in an iron vessel?

A. Coke and pig iron, not together. I have carried coke.

Q. State whether or not when you are compelled to shorten sail so as only to carry your lower top-sails, you would expect to have any water on the deck of your vessel if she were loaded.

A. I would expect to have a good deal, considerable.

Q. Would that be an unusual occurrence at sea?

A. No, sir, a very usual one.

Q. Now, Captain, I want to read to you some of the testimony given by the master of this vessel:

“Q. Now, Captain, during that time, when the leak increased so largely, what sail was your ship carrying? Can you tell by looking at your log? A. The foresail and two lower top-sails. We had lost the jib and lower stay-sails.”

If this vessel was carrying her foresail and her two lower top-sails, or was able to carry her foresail and two lower top-sails, I will ask you whether or not in your judgment, based upon your experience as a shipmaster, you would consider she was encountering weather that was any other than what might be expected on any voyage in the South Atlantic, or South Pacific, or around Cape Horn?

A. Well, we are liable to have fine weather any part of the season where we could only carry that sail even in the trade winds, not the regular trade

(Testimony of Hiram Coalfleet Davison.)

winds, but we have typhoons and cyclones there as well as anywhere else. [205] We are always expecting to have weather to take in sail at any time and any place.

Q. If you were in a typhoon or hurricane would you be carrying your foresail?

A. No, sir; it would not stay there very long if we did have it.

Q. Is it unusual occurrence at sea to lose your jibs or lower stay-sails?

A. No, sir; it is a very common occurrence.

Q. From the mere knowledge on your part that this vessel was carrying her foresail and her two lower top-sails, would that in your judgment indicate that she was encountering weather other than what she might expect on a voyage?

A. Well, if this means around Cape Horn, no. She would certainly expect that.

Q. I want to read you further from the testimony of the Master on page 11:

“Q. Now, go ahead and tell what happened next. A. We saw every day that water was increasing in the hold regularly, about one centimeter every hour. Q. What did you do with the pumps during that time? A. We pumped regularly, morning and evening. At 7:20 in the morning and 4:20 at night. Q. For how long a time each time? A. About 20 minutes each time. Q. Did you succeed in controlling the inflow of the water by this pumping? A. By pumping 40 minutes, we cleared the water from the hold. Q. How long did that go on? A.

(Testimony of Hiram Coalfleet Davison.)

Nothing happened particularly until the 22d of November. Q. Where was the vessel on that day? A. The vessel was about 49 degrees, 37 minutes south latitude"—I want you [206] to bear this in mind Captain—"and 66 degrees, 21 minutes west longitude."

Where does that place you with respect to the River Platte?

A. I don't know just the latitude of the River Platte now, but she would be to the east of the Horn, or not very far from the Falkland Islands.

Q. Not very far? A. No, sir.

Q. State whether or not she would be approaching what you might call the vicinity of the Horn?

A. Yes, sir; but she would be northward of the Horn, on the equatorial side.

Q. What character of weather might a vessel ordinarily expect in that vicinity during the month of November?

A. They have very nearly all kinds of weather there in that month or any other month in that latitude.

Q. State whether or not it would be an ordinary occurrence to commence to shorten sail to your two lower top-sails and foresail in that vicinity.

A. Yes, sir.

Q. It would be or would not be an ordinary occurrence? A. An ordinary occurrence?

Q. Yes.

A. Yes, sir; because the weather is very variable. You might have to shorten down to that more than

(Testimony of Hiram Coalfleet Davison.)

once in 24 hours; perhaps twice.

Q. I will go on:

“Q. Where was the vessel on that day? A. The vessel was about 49 degrees, 37 minutes south latitude, and 66 degrees, 21 minutes west longitude. On that date the weather was fine until 9 o'clock at night. The wind increased in force rapidly, and we had to take in all sails but the foresail, two lower top-sails, and the lower stay-sails. At 11 o'clock, the wind blew a storm, and the sea became heavier very rapidly. At 12 o'clock, in a gust, we lost the [207] top-mast stay-sail and the mizzen stay-sail. In a while the sea became tremendous, and we lost the fore stay-sail. The ship not being stayed by the sails we had lost, she rolled terribly. The decks were full of water. The decks being full of water, and the ship rolling heavily, we could not get the exact soundings. Q. Could you pump? A. No, sir, we could not pump. I went myself in the pump-well, and I saw there was an increase of water, but we could not pump because the bottom of the pipe at each rolling was dry, the vessel being on her side. Another survey was made at 4 o'clock in the afternoon, and we saw the same thing, the sea being still very heavy, and the wind shifting to the southwest, the ship in a cross sea. We wore the ship around at 8 o'clock. The sea was very high until the 25th of November at 8 o'clock A. M. On the 24th of November, coming around westerly at 2 o'clock

(Testimony of Hiram Coalfleet Davison.)

P. M., we wore the ship around to take a star-board tack. I ordered the pumps to be sounded by the carpenter when the ship was upright, and the carpenter reported that he found one meter and 25 centimeters in the hold, so that the water had increased rapidly since the morning. After the wearing of the ship, I set one watch to the pumps, and ordered an examination of the life-boats made to see that they were in order. At 6 o'clock, the wind freshened again, big seas coming from every part; the decks being always covered with water it was very difficult to work the pumps. At 6 o'clock, we found one meter, and 55 centimeters in the hold. At 6 o'clock, I called the crew aft and explained to them the situation, and we resolved to take refuge in the Falkland Islands for the [208] saving both the cargo and the ship. At the same hour we kept her off, and made for the Islands. Q. We do not need the further details until you get to the place where you beached the ship. A. That is a few hours later. Both watches were relieving each other at the pumps every half hour, so they were working continually, and I saw that the water did not increase so much while the ship was running before the wind."

Now, I will ask you, Captain, whether or not in your judgment the wind which he has detailed here was wind or weather that you might expect on a voyage around Cape Horn, in the vicinity of the Falkland Islands.

(Testimony of Hiram Coalfleet Davison.)

A. Well, that is the ordinary kind of weather that you might expect there.

Q. Is it a common experience or an uncommon experience at sea, to have the wind changed from one direction to the other?

A. It is a very common experience there because the wind and weather both change very quickly.

Q. Now, if you have had a gale of wind from one direction, say from the north or from the northwest, and that has worked up a sea running to the southeast, and your wind suddenly whips around so that it is blowing from the southwest, is that an ordinary occurrence or an unusual occurrence at sea?

A. That is the usual occurrence there. It ships very quickly, perhaps 8 points at a time, that is, 90 degrees.

Q. What effect has that on the sea?

A. That puts the sea right up in a heap and is very bad for the ship.

Q. What do you call that, what kind of a sea?

A. It is blowing one against the other; it puts it right up to a point. [209]

Q. Is that what you call a cross sea?

A. That is what I call a cross sea.

Q. Is that an ordinary or unusual experience at sea?

A. That is an ordinary experience off of the Horn.

Q. Now, I want to read to you again from this log, page 10:

“Q. On what date did the vessel leave Rotterdam? A. 17th of September, 1907. She was

(Testimony of Hiram Coalfleet Davison.)

cleared on the 17th, and left Rotterdam on the 19th. Q. What was the first port at which she stopped? A. Brest. Q. Where is Brest? A. In France. Q. And how long did she remain there, and on what days? A. She arrived on the 22d at 3 P. M., and left on the 24th at 9 A. M. in the morning. Q. Now, Captain, will you describe the first parts of the voyage, referring to your log, day after day, with reference to the weather which you encountered? A. We left Brest on the 21st at 9 o'clock in the morning. There was a small breeze from the north, shifting from the north to west, and we sailed until the 26th of September, and had fine weather and calm sea. We encountered westerly winds with a choppy sea. Q. On what day? A. The 26th of September. There was a swell until the 28th. Q. What occurred on the 28th? A. The wind hauled to the southwest, freshening and increased, the sea coming heavy rapidly. The wind shifted to the northwest on the 28th at 2 o'clock in the morning. The weather cleared up, but the sea became very heavy. We had very violent squalls, especially during the watch from 8 o'clock in the morning until noon. The weather became cloudy again in the afternoon with [210] squalls, the sea being very heavy, direction west, northwest. From 8 P. M. to midnight, the sea was still heavier, and the squalls more and more violent. Q. Are you still on the 28th? A. Yes, sir; on the 28th the

(Testimony of Hiram Coalfleet Davison.)

weather became fine, and the squalls less and less violent, the wind decreasing rapidly, there being still a squall. There were times when the ship was rolling heavily, the sea coming from abeam. At 4 o'clock in the afternoon, we found an increase of water in the ship's hold. We found 23 centimeters at 4 o'clock. We pumped at once, and cleared the water from the hold in a quarter of an hour. Q. What latitude and longitude was the vessel in on that day, the 29th? A. 38 degrees, 28 minutes north latitude at noon; 17 degrees, 43 minutes west. The vessel was steering south 35 degrees west. Q. Now, go ahead and tell what happened next? A. We saw every day that water was increasing in the hold regularly about one centimeter every hour. Q. What did you do with the pumps during that time? A. We pumped regularly, morning and evening. At 7:20 in the morning and 4:20 at night. Q. For how long a time each time? A. About 20 minutes each time. Q. Did you succeed in controlling the inflow of the water by this pumping? A. By pumping 40 minutes, we cleared the water from the hold. Q. How long did that go on? A. Nothing happened particularly until the 22d of November."

That leads us up to where we had that other weather. That was his testimony upon direct examination regarding the [211] weather shortly after leaving on this voyage. I am going to read now his cross-examination of the same weather, and I want you to listen to this very carefully because when I

(Testimony of Hiram Coalfleet Davison.)

get through I am going to ask you what character of weather you think it was. I want your opinion of it. I am reading from page 34:

“Q. On what day did you leave Brest?

A. 24th of September.

Q. The weather from the time you left Brest up to the 28th day of September, when the leak was sprung, was as fine weather as it was possible to have at sea, was it not?

A. The two or three first days. After that we had a breeze starting at the west, going to southwest, getting fresh, and shifting to the northwest.

Q. But you had no stormy weather up to that time—up to the 18th?

A. I have not examined the log.

Q. Look at your log, and tell us whether the weather was not the ordinary weather that a sailing vessel encounters without any stormy weather.

A. During the nights of the 26th and 27th, we had bad weather.

Q. Describe the weather as it is given in the log.”

This is his description given from the log. The Captain read this from the log himself:

“A. From 8 o'clock to midnight of the 26th we had bad weather”—Mr. Page was himself reading from the log.

Mr. PAGE.—Yes.

Mr. CAMPBELL.—Q. “‘All sails set.’ In the second watch, ‘Squally weather; nice breeze; all sails set.’ In the third watch, ‘Squally weather; nice breeze; all sails set.’ In the fourth watch, ‘Squally

(Testimony of Hiram Coalfleet Davison.)

weather of little strength, a fine breeze; all sails set.' In the next watch, 'Squally weather; nice breeze; all sails set.' Next watch, 'Cloudy; fine [212] breeze; a few squalls; all sails set.' The next day; 'From midnight of the 27th to midnight of the 28th.' In the first watch, 'Squally weather; strong rain; the wind blows to the southwest, and shifts to the northwest; gaff top-sail'—

Where is your gaff top-sail on that photograph (indicating)?

A. There is no gaff top-sail.

Q. Where would it be? Show it to the Court.

The COURT.—Mark it there with a pencil.

A. This vessel has not any gaff for a gaff top-sail. That is the gaff top-sail (pointing).

Mr. CAMPBELL.—I will ask to have this second photograph marked Libelants' Exhibit "B" for identification.

(The photograph is marked "Libelants' Exhibit 'B' for Identification.")

Mr. CAMPBELL.—I will ask the clerk to cross off the memorandum on the back of that photograph. It is no part of the exhibit.

Q. Now, this other photograph which purports to be a picture of the bark "Star of Iceland," where is the gaff top-sail on that?

A. This is the gaff top-sail (pointing); it goes between the gaff and the topmast,—on the mizzen top-sail in this case.

Q. And marked what in this photograph?

A. "22."

(Testimony of Hiram Coalfleet Davison.)

Q. Now, I will continue: "And main jib torn, royals and upper topgallant-sails and stay-sails and spanker taken in; unbent the main jib; violent squalls; strong winds; heavy sea; set the topgallant-sails and mizzen stay-sail."

In "Libelants' Exhibit 'B' for Identification," the last photograph I handed to you, will you give me the numbers of the two sails which he set when he set his topgallant-sails [213] and his mizzen stay-sail?

A. Is it main topgallant-sail, did he say, or both?

Q. Both of them. His topgallant-sail and mizzen stay-sail.

A. That would be "16"; "8" and "16" are the topgallant-sails; "13" is the mizzen stay-sail. That is "13" is it not (pointing)?

Mr. HENGSTLER.—I think that is "18."

Mr. CAMPBELL.—Yes, that is "18."

The WITNESS.—"18" then.

Mr. CAMPBELL.—Q. Then the log continues: "Next watch; 'Cloudy weather and squally; strong breeze; heavy sea from the west, northwest; the same sail as during the preceding watch.' Next watch, 'Squally weather; strong weather; strong breeze; furled the mainsail at 6 o'clock.'"

At this point, I want to ask you whether or not it is customary to furl the mainsail at night?

A. It is customary to furl it at any time. That would not make any difference. When we take it in we usually furl it at sea to keep it from blowing away.

Q. Do you know whether or not it is customary for

(Testimony of Hiram Coalfleet Davison.)

shipmasters to furl the mainsail at night in preparation for any weather that might come during the night? A. Yes, sir.

Q. Does the furling of the mainsail at night necessarily indicate that she at that time was encountering violent weather? A. Or expecting bad weather.

Q. Then it goes on: "Next watch on the same day: 'The same weather; very strong swell; violent squalls.' The next day, 'Midnight of the 28th to midnight of the 29th.' In the first watch, 'Fine weather; some squalls; strong breeze becoming less at the end of the watch.' Second watch, 'Fine weather; [214] fine breeze; set the mainsail; royal spanker and stay-sail.' " What would those be on the last photograph that I showed you?

A. Mainsail and royal.

Q. Mainsail, royal, spanker and stay-sail?

A. The mainsail will be "15" on this photograph. The royals "9" and "17."

Mr. HENGSTLER.—Q. That is not "15" but "18"?

A. This is the mizzen stay-sail, which I said was "13" and you said "18." We are getting mixed up. The mainsail is "13." The royals "9" and "17." What were the other sails?

Q. Stay-sail. A. Which stay-sail?

Q. It does not describe which stay-sail. We cannot identify that.

A. There are six stay-sails here.

Q. We will have to get that from the log. Let that pass. Let me go on and finish this log: "In the next

(Testimony of Hiram Coalfleet Davison.)

watch, 'Fine weather; fine breeze; all sails set.' In the next watch, 'Squally weather; the sea falls more and more; all sails set; tested the steam gear; found an increase of water in the hold; sounded 23 centimeters; cleared the pumps.' In the next watch, 'Fine weather; the breeze softens; all sails set.' The next watch, 'Fine weather; light breeze; all sails set.' "

And on that day, did you make any notation in your own handwriting on the log-book with reference to the discovery of water in the hold?

A. Yes, sir; I wrote at the foot of the log not to fail to sound at every watch, and to give an account to the Captain; if the water rises slowly and regularly, they must pump in the morning at 7:20 and in the evening at 4 o'clock.

Q. Does that log correctly state the facts as they occurred at the time with reference to the character of the weather? A. Yes, sir." [215]

Now, after hearing the weather which was detailed—

Mr. HENGSTLER.—May I ask you to add the next sentence?

Mr. CAMPBELL.—Yes. "During all of this time, or any part of this time, was your ship rolling?

A. Yes, sir. Q. Was that the natural roll of an ordinary ship in that kind of weather, or was it an extraordinary rolling? A. The rolling was caused by this wind which started at the southwest, and shifted to the northwest, the sea having become very heavy by the cross seas, and when the wind shifted

(Testimony of Hiram Coalfleet Davison.)

to the northwest, the wind decreased, and the vessel not being stayed by the sails, rolled heavily." Is that far enough, Mr. Hengstler?

Mr. HENGSTLER.—There is a little more of the same description.

Mr. CAMPBELL.—“Q. Is it not usual if a vessel rolls very heavily, that is more than is expected of her, to make an entry in the log that the ship has been rolling?

A. Generally, but it was neglected.

Q. Was there a laboring of the ship prior to the leak starting, which was unexpected or unusual?

A. Yes, sir, the day after that night, the wind shifted from the southwest to the northwest.

Q. Was the laboring of the ship upon that occasion very extraordinary?

A. The ship labored less than she did later after that storm at the Falkland Islands, but she did labor very much.

Q. Is it not usual for any ship to labor more or less in a cross sea without making water?

A. Certainly, the ‘Duc d’Aumale’ itself did it many times, probably, but this time she sprang a leak. [216]

Q. Then that must have come from some weakness of the ship before she started, did it not. There must have been some weakness?

A. I don’t think so.

Q. How can you account for the ship springing a leak in weather which was fine, all excepting during

(Testimony of Hiram Coalfleet Davison.)

one or two days at the most, and that weather not very bad, no storms?

A. I cannot give any other explanation.

Q. Then the only explanation that you have to give is that the ship strained in this kind of weather, and started a leak. That is the only explanation you can give? A. Yes, sir.

Q. After the leak was started, how long did the good weather continue?

A. Variable weather, up to the storm that we had in the west of the Falkland Islands."

Now, Captain, what kind of weather would you characterize the weather so described in this log?

Mr. HENGSTLER.—I shall have to object to this question, if your Honor please, upon the ground that the weather is described by the captain and it is for your Honor to determine what the weather is, and not for this witness to determine as to what kind of weather it is.

Mr. CAMPBELL.—I do not suppose that the Court has been to sea any more than any of the rest of us.

The COURT.—Let him answer the question.

A. The weather you have described was from fine weather up to a moderate gale and back to fine weather again, a moderate gale from southwest to northwest.

Mr. CAMPBELL.—Q. State whether or not that is the character of weather that might be expected on a voyage? A. Certainly, in that position too.

Q. In that position? A. Yes, sir. [217]

(Testimony of Hiram Coalfleet Davison.)

Q. Was he at any time shortened down under storm sail?

A. Yes, sir, the sail you have described here. It all depends on what position the ship is to the wind. If she was running with the wind aft she would *probably* all sails in a moderate gale; if she was hauled close to the wind, that is, with the wind on the side, she would be under lower top-sails and foresails, or perhaps main or perhaps fore upper top-sails.

Q. Suppose that you were master of that vessel and began to shorten sail and you would have this fair weather he described, with all sails set, and began to shorten sail, what sail would you first take in.

A. We would naturally take in these upper stay-sails and royals.

Mr. HENGSTLER.—My objection applies to all this line of testimony.

The COURT.—Yes.

Mr. CAMPBELL.—Q. What would you take in next?

A. The next would be the main-sail and topgal-lant-sails.

Q. Then what would you take in?

A. That would be the usual procedure.

Q. Then what would you take in next?

A. The upper top-sails and then the foresail.

Q. You would take in your upper top-sails before your foresail would be taken in?

A. Yes, sir; we usually do that.

Q. So then you would have her trimmed down so

(Testimony of Hiram Coalfleet Davison.)

that you would have her under lower top-sails and foresail?

A. Yes, sir; the last sails left would be probably the two lower top-sails. As a rule we never take them in unless they come themselves. [218]

Cross-examination.

Mr. HENGSTLER.—Q. Do you know the French bark “Duc d’Aumale”?

A. No, I have never seen her to my knowledge.

Q. How often did you say you were around Cape Horn?

A. I have only been around once, and that was from west to east; that was considered the easy way to go around.

Q. You were once in the neighborhood which you have described north of Cape Horn, where the storm occurred, in November, was it?

A. About November, yes.

Q. You have only been in that vicinity once?

A. Only the once.

Q. Is the laboring and the straining of a vessel dependent entirely upon the winds that she encounters.

A. No, not in all cases; sometimes a ship will be in a bad sea in a calm and she will labor because she will roll so heavily.

Q. She will roll in a bad sea if there is a heavy swell on and she will roll very heavily if there is a perfect calm, will she not? A. Yes, in some cases.

Q. So, Captain, is it possible therefore to indicate the condition of the sea by the sails carried by the vessel? A. I do not quite catch your question.

(Testimony of Hiram Coalfleet Davison.)

Q. Is it possible to describe and to indicate the condition of the sea, as to whether it is a calm sea or a heavy sea, from the sails which are carried by a vessel on that sea?

Q. Oh, yes, approximately, but not in all cases. Sometimes there is more sea than at others, in the case of the wind shifting, making a cross sea. At other times there is a heavy sea coming up perhaps with no wind; it is made by wind at some other place.
[219]

Q. And a vessel strains in a heavy sea, does she not?

A. Yes, she certainly strains in a heavy sea.

Q. In other words, the vessel does not strain because there is a certain wind but the vessel strains because the sea is heavy?

A. She will strain with a heavy wind to a certain extent.

Q. But usually because the heavy wind is followed by a heavy sea or accompanied by a heavy sea; that is the reason, is it not?

A. That is the usual thing, yes.

Q. Now, Captain, you say it is customary to furl the mainsail of a vessel at night if you expect a heavy storm?

A. Oh, it is not customary; some might do it as a precaution and others might not; that is simply a matter with the man that had charge of it.

Q. There is no custom to furl the mainsail simply because it is night time? A. No.

Q. That has nothing to do with it at all?

(Testimony of Hiram Coalfleet Davison.)

A. No.

Q. The wind and the storm cause the captain to furl the mainsail if it is sufficient of a storm; is that the fact?

A. Yes, sir. If he is expecting a storm or bad weather he might do it as a precaution.

Q. He sometimes might do it before the storm actually comes, simply as a matter of precaution?

A. Yes, sir.

Q. According to your view, the weather which has been described to you by Mr. Campbell on November 22d was a moderate gale, was it not?

A. On November 22d?

Q. No, on September 28th.

A. A moderate gale, yes; on September 28th, yes, probably what we would call a moderate gale.

Q. Another captain might describe it by another term, might he not? [220]

A. Well, there is a nautical term that we use by numbers; what we would call a moderate gale they would call No. 7, Beaufort Scale.

Q. What is the next severe weather on the Beaufort Scale? A. No. 8.

Q. What do you call that?

A. I believe they still call that a strong gale.

Q. Some captains would describe a particular gale as No. 7 and other captains would describe it as No. 8; that depends upon their opinion and their past experience, does it not? A. Yes.

Q. Captain, is your vessel consigned to Meyer, Wilson & Co.?

(Testimony of Hiram Coalfleet Davison.)

A. No. At present it is to J. & A. Brown.

Q. Have Meyer, Wilson & Co., any connection with your vessel in any way?

A. Not to my knowledge. I do not know the people myself personally.

Redirect Examination.

Mr. CAMPBELL.—Q. Captain, has any member of Meyer, Wilson & Co., or have I, previous to the time you went on the stand, ever described to you this weather?

A. No; I do not know a member of Meyer & Wilson's firm, and I have only met you outside here.

Q. I will ask you whether or not, in your judgment, the wind and weather described in the log on the 26th, 27th, 28th and 29th of September would produce a sea any heavier than what might be usually expected?

A. Well, I do not know that it is heavier than what would be usually expected; wind shifting that way from one point to another, that is a difference of nearly 90 degrees, would make a [221] cross sea and probably there would be as much water on her decks with that amount of sail on than if she had nothing but lower top-sails. In fact, if she was a very wet vessel and deep it is not unusual to have the decks full of water with all sail on—the decks full of water at times.

